

San Francisco Law Library

436 CITY HALL

No. 133387

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

No. 11795

2586

United States
Circuit Court of Appeals
For the Ninth Circuit.

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. David Zellerbach and Harold L.
Zellerbach, Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petitions to Review a Decision of the Tax Court
of the United States

FILED

FEB 5 - 1948

PAUL P. O'BRIEN, CLERK

No. 11795

United States
Circuit Court of Appeals
For the Ninth Circuit.

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. David Zellerbach and Harold L.
Zellerbach, Executors,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petitions to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| INDEX | PAGE |
|---|----------|
| Amended Answer..... | 20 |
| Amendment to Petition..... | 22 |
| Answer | 17 |
| Answer to Amendment to Petition..... | 135 |
| Appearances | 1 |
| Certificate of Clerk..... | 180 |
| Computation for Entry of Decision..... | 159 |
| Audit Statement..... | 160 |
| Consent to Settlement..... | 164 |
| Decision | 165 |
| Docket Entries | 2 |
| Findings of Fact and Opinion..... | 136 |
| Findings of Fact..... | 137 |
| Opinion | 145 |
| Motion for Leave to File Amended Answer.... | 19 |
| Notice of Filing Petition for Review..... | 176, 177 |
| Notice Under Rule 50..... | 158 |
| Petition | 4 |
| Exhibit A—Notice of Deficiency and State- ment | 10 |

| INDEX | PAGE |
|---|------|
| Petition of Estate of Isadore Zellerbach, Deceased, J. David Zellerbach and Harold L. Zellerbach, Executors, for Review by the United States Circuit Court of Appeals for the Ninth Circuit, of a Decision by the Tax Court of the United States..... | 166 |
| Praecipe for Record..... | 178 |
| Statement of Points on Which Appellant Intends to Rely on the Appeal, and Parts of Record Which Appellant Thinks Necessary for Consideration Thereof..... | 181 |
| Stipulation of Facts..... | 24 |
| Exhibit A—Last Will and Testament of Isadore Zellerbach..... | 30 |
| C—Income Tax Return 1942..... | 37 |
| D—Income Tax Return, 1943..... | 49 |
| E—Petition for Partial Distribution, Filed Aug. 19, 1942..... | 55 |
| F—Order and Decree for Partial Distribution, Filed Sept. 2, 1942 | 60 |
| G—Petition for Partial Distribution, Filed Nov. 25, 1942..... | 62 |
| H—Order and Decree for Partial Distribution, Filed Dec. 7, 1942 | 66 |
| I—Petition for Partial Distribution, Filed Nov. 25, 1942..... | 68 |

| INDEX | PAGE |
|--|------|
| J—Order and Decree for Partial Distribution, Filed Dec. 8, 1942 | 72 |
| K—Petition for Authority to Borrow Money and Pledge Personal Property..... | 75 |
| L—Order Authorizing Executors to Borrow Money, Execute Promissory Notes, and Pledge Personal Property..... | 78 |
| M—Petition for Partial Distribution, Filed June 18, 1943..... | 80 |
| N—Order and Decree for Partial Distribution, Filed July 7, 1943 | 84 |
| O—Petition for Partial Distribution, Filed Aug. 4, 1943..... | 87 |
| P—Order and Decree of Partial Distribution, Filed Aug. 18, 1943 | 91 |
| Q—Petition for Partial Distribution, Filed Nov. 30, 1943..... | 93 |
| R—Order and Decree for Partial Distribution, Filed Dec. 13, 1943 | 97 |
| S—Report of Estate of Isadore Zellerbach as of December 31, 1942 | 99 |

| INDEX | PAGE |
|--|------|
| T—Report of Estate of Isadore Zellerbach as of December 31, 1943 | 103 |
| Transcript of Proceedings..... | 107 |
| Opening Statement on Behalf of the Peti- tioner by Mr. Axelrod..... | 108 |
| Opening Statement on Behalf of the Re- spondent by Mr. Tonjes..... | 112 |
| Transcript of Proceedings—(Continued): | |
| Witnesses, Petitioner's: | |
| Eisenbach, Julian | |
| —direct | 128 |
| —cross | 130 |
| —redirect | 133 |
| Fitzpatrick, Timothy I. | |
| —direct | 116 |
| —cross | 120 |
| —redirect | 122 |
| O'Connor, Richard C. | |
| —direct | 124 |
| —cross | 126 |

APPEARANCES

For Taxpayer:

PHILIP S. EHRLICH,
ALBERT A. AXELROD.

For Commissioner:

E. A. TONJES.

Docket Number 9786

ESTATE OF ISADORE ZELLERBACH, deceased,
J. DAVID ZELLERBACH and HAROLD L. ZELLERBACH, Executors,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1945

Dec. 12—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 13—Copy of petition served on General Counsel.

1946

Jan. 11—Answer filed by General Counsel.

Jan. 11—Request for hearing in San Francisco, California, filed by General Counsel.

Jan. 15—Copy of answer served on taxpayer, San Francisco, California.

Oct. 4—Hearings set Dec. 2, 1946, San Francisco, California.

Dec. 6—Hearing had before Judge Van Fossan on merits. Petitioner's motion to amend petition granted; respondent's motion to amend answer granted. Stipulation as to facts, amendment to petition, amended answer filed at hearing and served. Petitioner's brief 1/21/47; respondent's brief due 3/10/47; petitioner's reply due 4/10/47.

1946

Dec. 30—Answer to amendment to petition filed by General Counsel. 1/8/47 copy served.

1947

Jan. 6—Transcript of hearing 12/6/46 filed.

Jan. 15—Brief filed by taxpayer. 1/16/47 copy served.

Mar. 6—Motion for extension to March 28, 1947, to file reply brief filed by General Counsel. 3/7/47 granted.

Mar. 28—Reply brief filed by General Counsel.

Apr. 24—Reply brief filed by taxpayer. Copy served.

July 22—Findings of fact and opinion rendered, Judge Van Fossan. Decision will be entered under Rule 50. Copies served.

Aug. 22—Respondent's computation for entry of decision filed.

Aug. 25—Hearing set Sept. 17, 1947, Washington, D. C., on Rule 50.

Sept. 10—Consent to settlement filed by taxpayer.

Sept. 16—Decision entered, Judge Van Fossan, Div. 9.

Oct. 14—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

Oct. 17—Proof of service filed.

Oct. 31—Notice and affidavit of service of filing petition for review filed.

Oct. 31—Praecipe for record filed by taxpayer with affidavit of service by mail thereon. [1*]

[Title of Tax Court and Cause.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Office of Internal Revenue Agent in Charge, San Francisco Division, IRA:90-D:LB) dated September 20, 1945, and as a basis of its proceeding alleges as follows:

1. The petitioner is Estate of Isadore Zellerbach, Deceased, which petition is brought by J. David Zellerbach and Harold L. Zellerbach, the executors thereof, by virtue of said executors' appointment by the Superior Court of the State of California in and for the City and County of San Francisco, with its principal office at No. 343 Sansome Street, San Francisco, California. The return for the periods here involved were filed with the [2] Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on September 20, 1945.

3. The taxes in controversy are income taxes for the calendar years 1942 and 1943 and the amount in controversy is \$138,529.70. The deficiency asserted is \$66,944.62 and the petitioner claims that it is entitled to a refund of \$71,585.08, which amount was paid by the petitioner within three years before the filing of this petition.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The refusal of the respondent to allow for the calendar year 1942 a claimed deduction in the amount of \$316,957.84 for income received by the petitioner and claimed by the petitioner to be distributable to the heirs of the decedent (beneficiaries of the estate) and includable by them in their respective income tax returns; the respondent having allowed as a deduction the amount of \$181,000 actually distributed by the petitioner, and refused to allow a further claimed deduction in the amount of \$135,957.84.

(b) The refusal of the respondent to allow for the calendar year 1943 a claimed deduction in the amount of \$188,297.50 for income received by the petitioner and claimed by the petitioner to be distributable to the heirs of the decedent (beneficiaries of the estate) and includable by them in their respective income tax returns; the respondent having allowed as a deduction the amount of \$96,000.00 actually distributed by the petitioner and refused to allow a further claimed deduction in the amount of \$92,297.50.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

(a) Isadore Zellerbach died testate on August 7, 1941, in the County of San Mateo, State of California, being at the time of his death a resident of the City and County of San Francisco, State of California; on the 2nd day of September, 1941, his

will was admitted to probate by the Superior Court of the State of California in and for the City and County of San Francisco in those certain probate proceedings entitled "In the Matter of the Estate of Isadore Zellerbach, Deceased, No. 87721," and J. David Zellerbach, Harold L. Zellerbach and Marcus M. Baruh, who were named therein as such, were appointed executors, and letters testamentary were issued to them. Marcus M. Baruh died on the 6th day of April, 1942, and ever since said date J. David Zellerbach and Harold L. Zellerbach have been and now are the duly appointed, qualified and acting [4] executors of the last will and testament of Isadore Zellerbach, Deceased.

(b) The estate filed income tax returns for the calendar years 1941, 1942 and 1943 with the Collector of Internal Revenue at San Francisco. For the taxable year 1942 the net income of petitioner was determined to be \$143,209.38 and for 1943 \$110,864.94.

(c) On December 7, 1942, the legatees of the estate petitioned the Probate Court for a partial distribution of income, which was granted, and pursuant to a decree of partial distribution the sum of \$181,000.00 income was distributed to the legatees in 1942. The distributable income of the estate for the year 1942 was the sum of \$316,957.42, which latter amount petitioner contends should have been allowed as a deduction in lieu of the sum of \$181,000.00, which was allowed.

(d) During the year 1943 the estate had distributable income in the amount of \$188,297.50. The

legatees during 1943 petitioned the Probate Court for a partial distribution of income in the sum of \$96,000.00, and pursuant to decrees of partial distribution, income in that amount was distributed to the legatees during 1943. The petitioner contends that the amount of the distributable income, to-wit: \$188,297.50, should have been allowed as a deduction in lieu of the sum of [5] \$96,000.00, which was allowed.

(e) At the time the distributions of the income were made all the debts of the estate had been paid; all specific legacies had been paid; the Federal Estate Tax as disclosed by the return had been paid; all state inheritance taxes had been paid; and all that remained unpaid was a possible additional assessment for federal estate taxes and some expenses of administration. However, there were still assets constituting the corpus of the estate remaining in the hands of the executors in excess of \$1,000,000.00, which amount was far in excess of the liabilities of the estate either actual or contingent. No portion of the income from the estate was required for the payment of these liabilities and the legatees were entitled, pursuant to the Probate laws of the State of California, to have all of said income distributed and paid to them, in accordance with their respective distributive shares, during the respective taxable years, either on a petition of the respective legatees or the executors or both. If such petitions had been filed the Probate Court would have granted the same.

(f) Based upon the foregoing facts, it is petitioner's contention that pursuant to the provisions of Section 162 of the Internal Revenue Code and the provisions [6] of Income Tax Regulations 111, Section 29.162-2, the entire distributable income for each of the years involved should have been included in the legatees' individual income tax returns in the amounts that they were entitled to have distributed to them and that the petitioner (the estate) was entitled to a deduction for the full distributable income.

Wherefore, the petitioner prays that this court may hear this proceeding and determine that the petition should be allowed as deductions against income for the year 1942 the sum of \$316,957.84, and for the year 1943 the sum of \$188,297.50, and that after such deductions are allowed, that the correct amount of the petitioner's income tax liability for the respective years be recomputed in accordance with Rule 50.

PHILIP S. EHRLICH,
ALBERT A. AXELROD,
Counsel for Petitioner. [7]

State of California,
City and County of San Francisco—ss.

J. David Zellerbach, being duly sworn, deposes and says:

That he is one of the executors of the Estate of Isadore Zellerbach, Deceased, the petitioner above named; that he has read the foregoing petition or had the same read to him, and is familiar with the

statements contained therein, and that the statements contained therein are true except as to those stated to be on information and belief, and that those he believes to be true.

J. DAVID ZELLERBACH.

Subscribed and sworn to before me this 7th day of December, 1945.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California. [8]
State of California,

City and County of San Francisco—ss.

Harold L. Zellerbach, being duly sworn, deposes and says:

That he is one of the executors of the Estate of Isadore Zellerbach, Deceased, the petitioner above named; that he has read the foregoing petition or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true except as to those stated to be on information and belief, and that those he believes to be true.

HAROLD L. ZELLERBACH.

Subscribed and sworn to before me this 7th day of December, 1945.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California. [9]

EXHIBIT "A"

[Letterhead Treasury Department]

Office of Internal Revenue Agent in Charge, San
Francisco Division. IRA:90-D. LB.

Estate of Isadore Zellerbach, Deceased
J. David Zellerbach and Harold L. Zellerbach,
Executors

343 Sansome Street
San Francisco, California

Dear Messrs. Zellerbach:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1942 and December 31, 1943 discloses a deficiency of \$66,944.62 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, as its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, 5, California for the attention of Conference Section. The signing and filing of this form

will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner,

By F. M. HARLESS,

Internal Revenue Agent

in Charge.

Enclosures:

Statement

Form [10]

STATEMENT

Tax Liability for the Taxable Years Ended
December 31, 1942 and December 31, 1943

| <i>Year</i> | <i>Income Tax</i> | | |
|-------------|-------------------|-----------------|-------------------|
| | <i>Liability</i> | <i>Assessed</i> | <i>Deficiency</i> |
| 1942 | \$ 98,778.19 | \$ 97,606.47 | \$ 1,171.72 |
| 1943 | 72,485.18 | 6,712.28 | 65,772.90 |
| Totals..... | \$171,263.37 | \$104,318.75 | \$66,944.62 |

In making this determination of your income tax liability, careful consideration has been given to your protest dated February 5, 1945; to the statements made at the conferences held on February 27, 1945 and July 12, 1945 and to your claim for refund filed on August 9, 1944 in the amount of \$71,585.08 for the year 1942.

If a petition to The Tax Court of the United States is filed against the deficiency proposed here-

in, the issue set forth in your claim for refund should be made a part of the petition to be considered by The Tax Court in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 3772 of the Internal Revenue Code.

Under the facts presented, it is held that none of the income of the taxable years 1942 and 1943, retained by the Estate, was placed unconditionally at the disposal of the beneficiaries. Accordingly, the deduction from income for each of these years, to which you are entitled, is limited to the amounts actually distributed within the taxable years 1942 and 1943. [11]

Adjustments to Net Income

Year: 1942

| | |
|--|-------------------|
| Net income as disclosed by return (Form 1041)..... | \$141,756.33 |
| Unallowable deductions and additional income: | |
| (a) Capital net gain..... | \$ 181.05 |
| (b) Other income..... | 1,200.00 |
| (c) Taxes | 72.00 1,453.05 |
| <hr/> | |
| Net income adjusted..... | \$143,209.38 |

Explanation of Adjustments

(a) Net capital gains of \$7,432.59 reported on your return are increased by \$181.05 by the following adjustments:

| | |
|---|-----------|
| (1) Net short term loss eliminated..... | \$ 217.05 |
| (2) Decrease in long term gain on sale of 1200 shares of stock of California Cotton Mills..... | 36.00 |
| <hr/> | |
| Net increase..... | \$ 181.05 |

(1) The net short term capital loss claimed on your return was composed of the following items:

| | |
|---|--------|
| Loss on sale 50 shares Studebaker Corporation stock..\$ | 337.05 |
| Gain on sale San Diego-El Cortez bonds..... | 120.00 |
| Net loss.....\$ | 217.05 |

The loss claimed on 50 shares of Studebaker Corporation stock is disallowed since the loss did not result from a sale in 1942 but from worthlessness which occurred in 1935.

The short term gain of \$120.00 on San Diego-El Cortez bonds is offset by the carryover of an equal amount of net short term loss from the year 1941 under the provisions of section 117(e)(2) of the Internal Revenue Code.

(2) Long term gain of \$6,600.00 on sale of 1200 shares of California Cotton Mills is decreased in the amount of \$36.00 being 50 per cent of the expense of \$72.00 applicable to the sale.

(b) Proceeds of \$1,200.00 was realized from an option, granted for sale of 1200 shares of stock of California Cotton Mills in 1942, but not exercised. Since there was no obligation to return the option proceeds, it is held that such sum constitutes an addition to taxable income of the estate.

(c) The deduction of \$144.00 claimed on your return for Federal stamp taxes on sale of 1200 shares of stock in California Cotton Mills is decreased by \$72.00 to \$72.00 the correct amount expended for such stamps.

Computation of Alternative Tax
Year: 1942

| | |
|---|--------------------------|
| Net income..... | \$143,209.38 |
| Minus: Net long-term capital gain..... | 7,613.64 |
| <hr/> | |
| Ordinary net income..... | \$135,595.74 |
| Less: Personal exemption..... | 500.00 |
| <hr/> | |
| Balance (surtax net income)..... | \$135,095.74 |
| <hr/> | |
| Net income subject to normal tax..... | \$135,095.74 |
| Normal tax at 6 per cent on..... | \$135,095.74 8,105.74 |
| Surtax on..... | 135,095.74 86,865.63 |
| <hr/> | |
| Partial tax..... | \$ 94,971.37 |
| Plus: 50 per cent of net long-term gain of \$7,613.64 | 3,806.82 |
| <hr/> | |
| Alternative tax..... | \$ 98,778.19 |

Computation of Tax
Year: 1942

| | |
|---|--------------------------|
| Net income adjusted..... | \$143,209.38 |
| Less: Personal exemption..... | 500.00 |
| <hr/> | |
| Balance (surtax net income)..... | \$142,709.38 |
| Net income subject to normal tax..... | 142,709.38 |
| Normal tax at 6 per cent on..... | \$142,709.38 8,562.56 |
| Surtax on..... | 142,709.38 92,880.41 |
| <hr/> | |
| Total tax..... | \$101,442.97 |
| <hr/> | |
| Alternative tax (in case of net long-term capital gain)..... | \$ 98,778.19 |
| <hr/> | |
| Correct income tax liability..... | \$ 98,778.19 |
| Income tax assessed: | |
| Original, account No. 1209423— | |
| First California District..... | 97,606.47 |
| <hr/> | |
| Deficiency of income tax..... | \$ 1,171.72 |

Adjustments to Net Income

Year: 1943

| | Income Tax Net Income | Victory Tax Net Income |
|---|--------------------------|---------------------------|
| Net income as disclosed by return..... | \$ 18,567.44 | \$ 15,483.16 |
| Unallowable deductions and additional income: | | |
| (a) Expense disallowed..... | 3,000.00 | 3,000.00 |
| (b) Income distributable to beneficiaries decreased..... | 89,328.30 | 89,328.30 |
| Total | <u>\$110,895.74</u> | <u>\$107,881.46</u> |
| Nontaxable income and additional deductions: | | |
| (c) Net capital gain..... | 30.80 | |
| Net income adjusted..... | <u>\$110,864.94</u> | <u>\$107,811.46</u> |

Explanation of Adjustments

(a) The deduction of \$3,000.00 claimed for commission paid to Felix Kahn for services related to sale of a yacht by the estate in 1941 is disallowed since the commission expense is directly chargeable against the proceeds of such sale which were reportable in the 1941 return of the estate.

(b) The deduction of \$185,328.30 for income distributable to beneficiaries of the estate is reduced by \$89,328.30 to \$96,000.00 which was the amount of distributions paid to estate beneficiaries within the taxable year.

(c) Reported net capital gain of \$18,567.44 is reduced by \$30.80 due to omission from the return of loss resulting from the following transaction:

| | |
|---|-----------------|
| Sold in December, 1942, 50 shares Studebaker Corporation for..... | \$269.00 |
| Bought on January 13, 1943, 50 shares Studebaker Corporation for..... | 299.80 |
| Short term loss realized..... | <u>\$ 30.80</u> |

Computation of Alternative Tax
Year: 1943

| | |
|---|-------------------------|
| Net income..... | \$110,864.94 |
| Minus: Net capital gain..... | 18,536.64 |
| <hr/> | |
| Ordinary net income..... | \$ 92,328.30 |
| Less: Personal exemption..... | 500.00 |
| <hr/> | |
| Balance (surtax net income)..... | \$ 91,828.30 |
| Net income subject to normal tax..... | 91,828.30 |
| Normal tax at 6 per cent on..... | \$91,828.30 5,509.70 |
| Surtax on..... | 91,828.30 2,847.79 |
| <hr/> | |
| Partial tax..... | \$ 58,357.49 |
| Plus: 50 per cent of excess of net long-term gain over net short term capital loss of \$18,536.64..... | 9,268.32 |
| <hr/> | |
| Alternative tax..... | \$ 67,625.81 |

Computation of Income and Victory Tax
Year: 1943

| | |
|---|-------------------------|
| Income tax net income..... | \$110,864.94 |
| Less: Personal exemption..... | 500.00 |
| <hr/> | |
| Surtax net income..... | \$110,364.94 |
| Balance subject to normal tax..... | \$110,364.94 |
| Normal tax at 6 per cent on \$110,364.94.... | \$ 6,621.90 |
| Surtax on..... | 110,364.94 67,328.30 |
| Total income tax..... | \$ 73,950.20 |
| <hr/> | |
| Total alternative tax (in case of net long-term capital gain)..... | \$ 67,625.81 |
| Total income tax..... | 67,625.81 |
| Victory tax net income..... | \$107,811.46 |
| Less: Specific exemption..... | 624.00 |
| <hr/> | |
| Income subject to victory tax..... | \$107,187.46 |
| Victory tax before credit (5 per cent of \$107,187.46)..... | 5,359.37 |

| | | |
|--|--------|-----------|
| Less: Victory tax credit..... | 500.00 | |
| Net victory tax..... | | 4,859.37 |
| <hr/> | | |
| Net income tax and victory tax..... | \$ | 72,485.18 |
| Total income and victory tax liability..... | | 72,485.18 |
| Income and victory tax liability disclosed by re- turn Original, Account No. 186677—First Cali- fornia District..... | | 6,712.28 |
| <hr/> | | |
| Deficiency in income and victory tax..... | \$ | 65,772.90 |

Filed Dec. 12, 1945.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(a) and (b). Denies that the Commissioner erred in the determination of the deficiencies as alleged in paragraph 4 of the petition and subparagraphs (a) and (b) thereunder.

5(a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

5(c). Admits that on December 7, 1942, the legatees of the estate petitioned the Probate Court for a partial distribution of income, which was

granted, and pursuant to a decree of partial [17] distribution the sum of \$181,000.00 income was distributed to the legatees in 1942; denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Admits that the legatees during 1943 petitioned the Probate Court for a partial distribution of income in the sum of \$96,000.00, and pursuant to decrees of partial distribution, income in that amount was distributed to the legatees during 1943; but denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e). Denies the allegations contained in subparagraph (e) of paragraph 5 of the petition.

5(f). Denies the allegations of fact contained in subparagraph (f) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ J. P. WENCHEL, TMM

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel;

T. M. MATHER,

Special Attorney,

Bureau of Internal Revenue.

TMM:b 1/5/46

Received and filed Jan. 11, 1946. [18]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE
AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and asks leave to file the attached amended answer in the above-entitled proceeding, and as his reasons therefor respectfully represents to the Court as follows:

The notice of deficiency from which appeal is taken sets forth net income as adjusted for the year 1942 in the sum of \$143,209.38 and a deficiency of \$1,171.72; for the year 1943 a net income adjusted of \$110,864.94, a victory tax net income adjusted of \$107,811.46 and a deficiency of \$65,772.90, whereas the correct net income as adjusted for the year 1942 is \$143,911.53 [19] and the correct deficiency is \$1,768.55; and the correct adjusted net income for income tax for 1943 is \$112,700.79, the adjusted net income for victory tax is \$109,647.31, and the correct deficiency for 1943 is \$67,425.17; so that it is necessary for the respondent to allege the above facts in support of his claim for increased deficiencies.

Wherefore, it is prayed that this motion be granted.

/s/ J. P. WENCHEL, TMM
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
T. M. MATHER,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

EAT:ec 12/4/46.

Granted Dec. 6, 1946.

/s/ ERNEST W. VAN FOSSAN,
Judge.

Filed Dec. 6, 1946. [20]

[Title of Tax Court and Cause.]

AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed by the above-named petitioner, admits, denies and alleges as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4(a), (b). Denies that the Commissioner erred in the determination of the deficiencies as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a), (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c) to (f), inclusive. Denies the allegations contained in subparagraphs (c) to (f), inclusive, of paragraph 5 of the petition. [21]

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Further answering, respondent alleges as follows:

7. The notice of deficiency from which appeal is taken sets forth net income as adjusted for the year 1942 in the sum of \$143,209.38 and a deficiency of \$1,171.72; for the year 1943 a net income adjusted of \$110,864.94; a victory tax net income adjusted of \$107,811.46 and a deficiency of \$65,772.90, whereas the corrected net income as adjusted for the year 1942 is \$143,911.53 and the correct deficiency is \$1,768.55; and the correct adjusted net income for income tax for 1943 is \$112,700.79, the adjusted net income for victory tax is \$109,647.31, and the correct deficiencies for 1943 is \$67,425.17. Claim for the increased deficiencies for the years 1942 and 1943 is hereby demanded.

Wherefore, the respondent prays that the Court redetermine the deficiency herein to be the amount determined by the Commissioner, viz.: \$1,171.72 deficiency in income tax for the year 1942, plus an

increased deficiency in the amount of \$596.83; \$65,-772.90 deficiency in victory tax for the year 1943, plus an increased deficiency in the amount of \$1,652.27, claim for which is hereby made pursuant to the provisions of Section 274(e) of the Internal Revenue Code.

/s/ J. P. WENCHEL, TMM

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,

E. A. TONJES,
Special Attorneys,

Bureau of Internal Revenue.

EAT:ec 12-4-46.

Filed Dec. 6, 1946. [22]

[Title of Tax Court and Cause]

AMENDMENT TO PETITION

By leave of Court first had and obtained, the Petitioners herewith amend their Petition in the above matter by adding two subdivisions to Paragraph 5 of said Petition, to be designated, respectively “(e-1)” and “(e-2)”, to-wit:

(e-1) That during the year 1942 there was distributed to the residuary legatees and devisees under the last Will and Testament of decedent, in the proportions which they took under the Will of the decedent, in addition to the income which was distrib-

uted to them, property which had a fair market value of \$1,146,000.00

(e-2) That during the year 1943 there was distributed to the residuary legatees and devisees under the last Will and [23] Testament of decedent, in the proportions which they took under the Will of decedent, in addition to the income which was distributed to them, property which had a fair market value of \$30,950.00.

PHILIP S. EHRLICH,
ALBERT A. AXELROD,
Counsel for Petitioner. [24]

State of California,
City and County of San Francisco—ss.

Harold L. Zellerbach, being duly sworn, deposes and says:

That he is one of the Executors of the last Will and Testament of Isadore Zellerbach, deceased, the Petitioner above named; that he has read the foregoing Amendment to Petition or had the same read to *them*, and is familiar with the statements therein contained, and that the statements contained therein are true except as to those stated to be on information and belief, and that those he believes to be true.

HAROLD L. ZELLERBACH,

Subscribed and sworn to before me this 5th day of December, 1946.

/s/ CLIFTON H. JACK,
Deputy Clerk,

The Tax Court of the U. S.

Filed Dec. 6, 1946. [25]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between counsel for respective parties hereto that the following facts are admitted to be true:

(1) That Isadore Zellerbach died testate on August 7, 1941, in the County of San Mateo, State of California, being at the time of his death a resident of the City and County of San Francisco, State of California; on the 2nd day of September, 1941 his will was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, in those certain probate proceedings entitled "In the Matter of the Estate of Isadore Zellerbach, Deceased, No. 87721", and J. David Zellerbach, Harold L. Zellerbach and Marcus M. Baruh, who were named therein as such, were appointed Executors, and Letters Testamentary were issued to them. Marcus M. Baruh died on the 6th day of April, 1942, and ever since said date J. David [26] Zellerbach and Harold L. Zellerbach have been and now are the duly appointed, qualified and acting Executors of the Last Will and Testament of Isadore Zellerbach, deceased. A copy of the said Last Will and Testament of Isadore Zellerbach is attached hereto and marked Exhibit A.

(2) The estate filed income tax returns on the cash basis for the calendar years 1942 and 1943 with the Collector of Internal Revenue at San Francisco,

California. Copies of said returns are attached hereto and marked Exhibit C and D. (There is no Exhibit B).

(3) That on the 19th day of August, 1942, the Executors of the Last Will and Testament of the said decedent filed a petition with the Probate Court to make a partial distribution. A copy of said petition is attached hereto and marked Exhibit E.

(4) That on the 2nd day of September, 1942, the Probate Court made an order authorizing the Executors to make a partial distribution. A copy of said court order is attached hereto and marked Exhibit F.

(5) That on the 25th day of November, 1942, the Executors of the Last Will and Testament of said decedent filed a petition with the Probate Court to make a partial distribution. A copy of said petition is attached hereto and marked Exhibit G.

(6) That on the 7th day of December, 1942, the Probate Court made an order authorizing the Executors to make a partial distribution. A copy of said court order is attached hereto and marked Exhibit H. [27]

(7) That on the 25th day of November, 1942, the Executors petitioned the Probate Court for a partial distribution of the estate. A copy of said petition is attached hereto and marked Exhibit I.

(8) That on the 8th day of December, 1942, the Probate Court made and entered its Order and De-

cree of Partial Distribution. A copy of said Order and Decree of Partial Distribution is attached hereto and marked Exhibit J.

(9) That on the 26th day of October, 1942, the Executors petitioned the Probate Court for an order authorizing them to borrow a sum not to exceed \$1,000,000.00. A copy of said petition is attached hereto and marked Exhibit K. On November 6, 1942 the Probate Court made an order authorizing said Executors to borrow said sum of money and to secure the same by a pledge of certain of the assets of the estate. A copy of said order is attached hereto and marked Exhibit L.

(10) That pursuant to said authorization, the Executors borrowed from Wells Fargo Bank & Union Trust Co. the sum of \$500,000.00, and from Jennie B. Zellerbach the sum of \$318,669.31. That the indebtedness to the Wells Fargo Bank & Union Trust Co. was secured by 9,000 shares of the preferred capital stock of Crown Zellerbach Corporation belonging to said estate, which had a market value at said time of approximately \$720,000.00.

(11) That on the 31st day of December, 1942, all the distributions authorized by said Probate Court during the year 1942 had been made. [28]

(12) That on the 18th day of June, 1943, the Executors of the Last Will and Testament of said decedent filed a petition with the Probate Court to make a partial distribution. A copy of said petition is attached hereto and marked Exhibit M.

(13) That on the 7th day of July, 1943, the Probate Court made an order authorizing the Executors to make a partial distribution. A copy of said court order is attached hereto and marked Exhibit N.

(14) That on the 4th day of August, 1943, the Executors of the Last Will and Testament of said decedent filed a petition with the Probate Court to make a partial distribution. A copy of said petition is attached hereto and marked Exhibit O.

(15) That on the 18th day of August, 1943, the Probate Court made an order authorizing the Executors to make a partial distribution. A copy of said court order is attached hereto and marked Exhibit P.

(16) That on the 30th day of November, 1943, the Executors filed a petition with the Probate Court for authority to make a partial distribution. A copy of said petition is attached hereto and marked Exhibit Q.

(17) That on the 13th day of December, 1943, the Probate Court made and entered an order of decree for partial distribution. A copy of said order is attached hereto and marked Exhibit R.

(18) That on the 31st day of December, 1943, all the distributions authorized by said Probate Court during the year 1943 had been made. [29]

(19) The total net income of the petitioner for the year 1942, before any allowance for income dis-

tributed to beneficiaries during said year was \$324,209.38, which said sum is composed of ordinary income in the amount of \$316,595.74 and capital gain in the amount of \$7,613.64.

(20) The total net income of the petitioner for the year 1943, before any allowance for income distributed to beneficiaries during said year was \$206,864.94, which said sum is composed of ordinary income in the amount of \$188,328.30 and capital gain in the sum of \$18,536.64.

(21) That of the distributions made in the year 1942 referred to in Paragraph (6) hereof, \$180,297.85 was paid out of income and \$702.15 was paid out of corpus.

(22) That of the distributions made in the year 1943 referred to in Paragraph (17) hereof, \$94,164.15 was paid out of income and \$1,835.85 was paid out of corpus.

(23) That at December 31, 1943, the Federal estate tax, as disclosed by the return, had been paid.

(24) That the Commissioner subsequently determined that the petitioner was liable for a deficiency in Federal estate taxes which controversy was finally settled in November, 1946.

(25) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on December 8, 1942, Exhibit J attached hereto, was the sum of \$1,146,000.00. [30]

(26) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on July 7, 1943, Exhibit N attached hereto, was the sum of \$27,500.00.

(27) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on August 18, 1943, Exhibit P attached hereto, was the sum of \$3,450.00.

(28) That on January 24, 1944, Jennie B. Zellerbach filed an amended Federal income tax return with the Collector of Internal Revenue, at San Francisco, California, which amended return reported as having been distributed to her one-half of all of the income of the estate of Isadore Zellerbach, deceased, for the year 1942, to-wit, \$157,661.87.

(29) That the said Jennie B. Zellerbach included in her Federal income tax return for the year 1943, as income received by her from the estate of Isadore Zellerbach, deceased, for the year 1943, to-wit, the sum of \$92,664.15.

(30) That attached hereto, marked Exhibit S, is an audited report of the estate of Isadore Zellerbach, deceased, including the balance sheet with the statement of all the assets and liabilities of said estate as of December 31, 1942. [31]

(31) That attached hereto, marked Exhibit T, is an audited report of the estate of Isadore Zeller-

bach, deceased, including the balance sheet with the statement of all the assets and liabilities of said estate as of December 31, 1943.

Dated: December 5, 1946.

/s/ PHILIP S. EHRLICH,

/s/ ALBERT A. AXELROD,

Counsel for Petitioner.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of
Internal Revenue,

Counsel for Respondent.

Of Counsel:

B. H. NEBLETT,

Division Counsel;

T. M. MATHER,

E. A. TONJES,

Special Attorneys, Bureau of Internal
Revenue. [32]

EXHIBIT A.

I, Isadore Zellerbach of the City and County of San Francisco, State of California, being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do hereby make, publish and declare this my last will and testament, hereby revoking any and all other wills and codicils by me heretofore made.

If my beloved wife, Jennie B. Zellerbach shall have predeceased me and shall have bequeathed to

me her share of the capital stock of the Zellerbach Levison Company, a corporation, then I give and bequeath all of said shares so bequeathed to me by my wife to my three children, J. David Zellerbach, Harold L. Zellerbach and Claire Zellerbach Saroni, but in trust, nevertheless, for the following uses and purposes:

My said three trustees shall collect the dividends and income upon said stock and divide the same equally among my said three children, that is to say, one-third to each of them, or in the event of the death of any of them then the portion of the dividends and income which would have gone to such deceased child, had he or she been living, shall go to his or her heirs and said trust shall continue unless said trust property shall be sold or disposed of as a whole, as hereinafter provided, so long as any one of my three children shall survive. Upon the sale or other disposition of the said shares of Zellerbach Levison Company as a whole, or upon the death of the last survivor of my said children, said trust shall terminate and the trust property shall go to and vest in my said children in equal parts, or in the event of the death of any or all of my said children then in the heirs of such deceased child or children per stirpes and not per capita, [33] provided that in the event that any of my children shall have died leaving a will disposing of the whole or any part of such trust property which would have gone to such deceased child had he or she lived then such portion of the trust property so disposed of shall

go to the persons or person designated in and by said will to take the same.

My said three trustees shall have no power to sell, pledge, exchange or otherwise dispose of any portion of said trust property other than the whole thereof, but they shall have full power to sell, exchange or otherwise dispose of all of said trust property, or to pledge the same, as a whole upon such terms and conditions and for such price as said trustees, or a majority of them, may deem best. During the continuance of said trust by said trustees shall have all the powers which it is possible and legal for me to give to them, and such powers may be exercised by the majority of them. The only limitation upon their powers will be that they shall not, during the continuance of said trust, sell, exchange or otherwise dispose of said property or pledge the same except as a whole.

In the event that said Zellerbach Levison Company shall declare any stock dividends then such dividends shall be added to the trust property and my said trustees shall have the same powers and be subject to the same restrictions or limitations as they shall have and be subject to with respect to the original shares hereby bequeathed to them in trust.

The interest or interests of the beneficiaries of the trust herein created shall not be assignable by voluntary or involuntary assignment, or by operation of law, and/or shall not be subject to [34] the claims of their creditors or creditors of any of them.

I hereby give and bequeath to each of my grandchildren, Jane Saroni, Louis Saroni and A. B. Saroni, Jr., (children of my daughter, Claire Zellerbach Saroni), and James D. Zellerbach and Richard Zellerbach (sons of my son, J. David Zellerbach), and William J. Zellerbach, Rolinde Zellerbach and Stephen Anthony Zellerbach, (children of my son, Harold L. Zellerbach, the sum of five thousand dollars \$5,000), making a total of forty thousand dollars (\$40,000); provided, however, that said legacies may be paid by my executors either in cash or in shares of stock or other securities belonging to my estate which, in the opinion of my executors, shall be of the value mentioned, or partly in cash and partly in such shares of stock or other securities as my executors may determine, and provided further that said legacies shall not become due until and shall not be paid until my executors shall have cash or such shares of stock or other securities on hand or which, in their opinion, shall be available for the payment or satisfaction of said legacies.

I also hereby give and bequeath a like sum of five thousand dollars (\$5,000), under the same conditions and under the same provisions set forth in the foregoing paragraph, to each and every other grandchild of mine which may be born after the execution of this will.

The bequests and provisions which I have made in this my will for the beneficiaries therein named are intended by me to be the net amount or net property which each of them is to receive after the pay-

ment of all inheritance or estate taxes provided for by the laws of the State of California or otherwise, so that it may be considered that I am devising and bequeathing [35] to each of them the amount of such taxes in addition to the bequests or provisions which I have herein made for them.

I hereby give, devise and bequeath unto my dear wife, Jennie B. Zellerbach, an undivided three-sixths of all of the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, and I hereby give, devise and bequeath the remaining undivided three-sixths of said rest, residue and remainder of my estate to my three children, J. David, Harold L. and Claire, one-sixth to each.

I nominate and appoint J. David Zellerbach, Harold L. Zellerbach and Marcus M. Baruh as executors of this my last will and testament. I hereby give my executors full, absolute and complete power and authority to sell, mortgage, pledge, exchange or otherwise dispose of or deal with the whole or any portion of my estate according to their judgment and discretion, and without any order of court whatsoever, except as to the said shares of the capital stock of the Zellerbach Levison Company which I desire to be held in trust for the uses and purposes hereinbefore stated. I direct that no bond or bonds of any kind be required of my executors or of any of them, during the administration of my estate, for any purpose.

In Witness Whereof, I have hereunto subscribed my name at the City and County of San Francisco, State of California, on this 4th day of June, 1931.

ISADORE ZELLERBACH.

In the presence of:

F. D. Madison, residing at San Rafael, California; Marshall P. Madison, residing at 3570 Clay St., San Francisco, Calif.

The foregoing instrument, consisting of three pages besides [36] this page, was at the date thereof by Isadore Zellerbach, the maker thereof, signed in our presence and in the presence of each of us, the attesting and subscribing witnesses, and at the time of his subscribing said instrument he declared to us and to each of us that it was his last will and testament, and at his request and in his presence and in the presence of each other we have subscribed our names as witnesses thereto.

F. D. MADISON,
MARSHALL P. MADISON.

EX C

Form 1041
Treasury Department
Internal Revenue Service

UNITED STATES

Page 1
1942

FIDUCIARY INCOME TAX RETURN

(FOR ESTATES AND TRUSTS)
For Calendar Year 1942

or fiscal year beginning, 1942, and ending, 1943

File this return not later than the 15th day of the third month following the close of the taxable year.

(PRINT NAMES AND ADDRESS PLAINLY BELOW)

Name of Estate or Trust ESTATE OF ISADORE ZELLERBACH, DECEASED

Name and Address of Fiduciary
J. DAVID ZELLERBACH AND HAROLD L. ZELLERBACH, Surviving Executors.
343 Sansome Street
San Francisco, California

(Do Not Use These Spaces)

File Code 3203

Serial No. 1209423

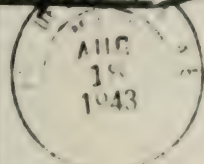
Disbursements (Check or Stamp)

Check First Payment

| INCOME | | |
|--|-------------------------------|---------------|
| 1. Dividends | | \$ 323,152.80 |
| 2. Interest on bank deposits, notes, etc. | | 1,099.46 |
| 3. Interest on corporation bonds, etc., (except interest to be reported in item 4) | Less amortizable bond premium | 245.90 |
| 4. Interest on tax-free covenant bonds upon which a Federal tax was paid at source | | |
| 5. Interest on Government obligations, etc.: | | |
| (a) From lines (e), (f), and (g), column 3 (a), Schedule B | | |
| (b) From line (h) Schedule B | | |
| (c) From line (i) Schedule B | | |
| 6. Income (or loss) from partnerships, syndicates, pools, etc., and income from other fiduciaries (Name and address): <u>Zellerbach-Levison Co., San Francisco, Calif.</u> | | 3,178.42 |
| 7. Rents and royalties (from Schedule C) | | 2,747.50 |
| 8. (a) Net gain (or loss) from sale or exchange of capital assets (from Schedule E) | | 7,432.59 |
| (b) Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule F) | | |
| 9. Net profit (or loss) from trade or business (attach statement) | | |
| 10. Other income (state nature of income) | | 225.00 |
| 11. Total income in items 1 to 10 (enter non-exempt income in Schedules B and F) | | \$ 338,681.47 |

| DEDUCTIONS | | |
|--|--|---------------|
| 12. Interest (explain in Schedule G) | | \$ 1,099.46 |
| 13. Taxes (explain in Schedule G) | | 13,900.01 |
| 14. Other deductions authorized by law (explain in Schedule G) | | 449.62 |
| 15. Total deductions in items 12 to 14 | | 15,449.09 |
| 16. Balance (item 11 minus item 15) | | \$ 323,232.38 |
| 17. Less amount distributable to beneficiaries (item 5 (a), above, plus total of column 2, Schedule A) | | 221,000.00 |
| 18. Net income (taxable to fiduciary) (item 16 minus item 17) | | \$ 102,232.38 |

| COMPUTATION OF TAX | | |
|--|--|---------------|
| 19. Net income (item 18 above) | | \$ 102,232.38 |
| 20. Less: Personal exemption | | |
| 21. Balance (surplus net income) | | \$ 102,232.38 |
| 22. Less: Interest on Government obligations, etc. (item 5 (b), above) | | |
| 23. Balance subject to normal tax | | \$ 102,232.38 |
| 24. Normal tax (6% of item 23) | | \$ 6,133.94 |
| 25. Surplus on item 21 | | \$ 96,098.44 |
| 26. Total tax (item 24 plus item 25) | | \$ 102,232.38 |
| 27. Total tax (item 26 or line 14, Schedule E) | | \$ 102,232.38 |
| 28. Less: Fiduciary's share of income tax paid at source | | |
| 29. Fiduciary's share of income tax paid to a foreign country or United States possession (Attach Form 1116) | | |
| 30. Balance of tax (item 27 minus items 28 and 29) | | \$ 102,232.38 |



Schedule D—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, E, AND F. (See instruction 1.)

| 1. Kind of property (if buildings, state method of which determined) | 2. Date acquired | 3. Cost or other basis (do not include land or other nondepreciable property) | 4. Depreciation allowed in prior years | 5. Depreciation claimed for current year | 6. Depreciation allowed for other basis to be recovered | 7. Estimated life used in computing depreciation | 8. Estimated remaining life from beginning of year | 9. Depreciation allowable this year |
|--|------------------|---|--|--|---|--|--|-------------------------------------|
| | | \$ | \$ | \$ | \$ | | | \$ |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |

Part II—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See instruction 8.)

| 1. Description of property (do not include property already reported elsewhere) | 2. Date sold | 3. Date acquired | 4. Gross sales price (adjusted price) | 5. Cost or other basis | 6. Depreciation allowed (or other adjustments) taken on property or March 1, 1913 | 7. Depreciation allowed (or other adjustments) taken on property or March 1, 1913 (include in Schedule D) | 8. Gain or loss (net—see instructions 4 and 5) | 9. Percentage | 10. Amount |
|---|--------------|------------------|---------------------------------------|------------------------|---|---|--|---------------|------------|
| | Mo. Day Year | Mo. Day Year | | | | | | | |

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS

| | | | | | | | | |
|--|--|----|----|----|----|----|-----|----|
| | | \$ | \$ | \$ | \$ | \$ | 100 | \$ |
| | | | | | | | 100 | |
| | | | | | | | 100 | |
| | | | | | | | 100 | |

Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

| | | | | | | | | |
|--|--|----|----|----|----|----|----|----|
| | | \$ | \$ | \$ | \$ | \$ | 50 | \$ |
| | | | | | | | 50 | |
| | | | | | | | 50 | |
| | | | | | | | 50 | |

Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)

SUMMARY OF CAPITAL GAINS OR LOSSES

| 1. Classification | 2. Net short-term capital loss of preceding taxable year (not in excess of net income for such year), but only to extent of net short-term capital gain of current year | 3. Net gain or loss to be taken into account from column 10, above | | 4. Net gain or loss to be taken into account from partnerships and common trust funds | | 5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary | |
|---|---|--|----------|---|----------|---|----------|
| | | (a) Gain | (b) Loss | (a) Gain | (b) Loss | (a) Gain | (b) Loss |
| 1. Total net short-term capital gain or loss | \$ | \$ | \$ 217 | \$ | \$ | \$ | \$ 217 |
| Total net long-term capital gain or loss | | \$ 7,649 | \$ | \$ | \$ | \$ 7,649 | \$ |
| 3. Net gain in column 5, lines 1 and 2. (Enter as item 8(a), page 1) | | | | | | \$ 7,432 | 59 |
| 4. Net loss in column 5, lines 1 and 2. (The amount to be entered as item 8 (a), page 1, is (1) this item or (2) net income, computed without regard to capital gains or losses, or (3) \$1,000, whichever is smallest) | | | | | | | -- |

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term capital gain over net short-term capital loss and item 21, page 1, exceeds \$18,000

| | | | | | |
|---|-------------|----|--|-----------|-----|
| 1. Net income (item 18, page 1) | \$ 3,337.12 | 23 | 8. Normal tax (6% of line 7) | \$ 200.23 | 42 |
| 2. Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), minus line 1, column 5 (b), of summary above) | 7,649 | 27 | 9. Surtax on line 5. (See instruction 25) | 298.60 | 75 |
| 3. Ordinary net income (line 1 minus line 2) | 3,337.12 | 24 | 10. Partial tax (line 8 plus line 9) | 498.83 | 117 |
| 4. Less: Personal exemption (item 23, page 1) | 2,000 | 25 | 11. 50% of line 2 | 3,724.50 | 30 |
| 5. Balance (surtax net income) | 1,337.12 | 26 | 12. Alternative tax (line 10 plus line 11) | 9,100.47 | 47 |
| 6. Less: Interest on Government obligations, etc. (item 2 (b), page 1). (See instruction 22) | | | 13. Total normal tax and surtax (item 26, page 1) | 1,002.07 | 88 |
| 7. Balance subject to normal tax | 1,337.12 | | 14. Tax liability (line 12 or line 13, whichever is the lesser) (Enter as item 27, page 1) | 476.06 | 15 |

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items in Schedule E.

If any of the items were acquired by you other than by purchase, explain fully how acquired:

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 9)

Page 4

| 1. Kind of property | 2. Date acquired | 3. Gross sales price (net cost price) | 4. Cost or other basis | 5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913 | 6. Depreciation allowed (or allowable) under chapter 16 or March 1, 1913 (Explain in Schedule D) | 7. Gain or loss (columns 3 plus column 6, minus the sum of columns 4 and 5) |
|--|------------------|---------------------------------------|------------------------|---|--|---|
| | | \$ | \$ | \$ | \$ | \$ |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| Total net gain (or loss) (enter as item 8 (f), page 1) | | | | | | \$ |

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:

Schedule G.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 13, and 14. (See Instructions 12, 13, and 14)

| 1. Item No. | 2. Explanation | 3. Amount | 1. Item No. (continued) | 2. Explanation (continued) | 3. Amount (continued) |
|-------------|--------------------------|-------------|-------------------------|----------------------------|-----------------------|
| 12. | Wells Fargo Bank | \$ 1,909 72 | 14. | Postage | \$ 7 16 7 |
| 13. | California Income Tax | 12,033 60 | | Bookkeeper | 442 15 |
| | Employer's Social Sec. | 4 44 | | | |
| | Documentary Stamps | 493 50 | | | |
| | Real Estate Tax | 623 84 | | | |
| | Stock and Bond Transfers | 419 51 | | | |

Schedule H.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction 11)

| 1. Source of income | 2. Nature of income | 3. Amount |
|------------------------------|----------------------|-----------|
| Honolulu Oil Corporation | Non-taxable dividend | \$ 17 00 |
| Kennecott Copper Corporation | Non-taxable dividend | 60 18 |
| John Klabach | See note attached | 1,200 00 |

QUESTIONS

1. Was a return of income filed for the preceding year? Yes If so, to which collector's office was it sent? San Francisco
2. Date estate or trust was created August 7, 1941
3. If copy of will or trust instrument and statement required under Instruction I have been previously furnished, state when and where filed Attached to 1941 Return
4. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
5. Did you at any time after October 3, 1942, and before the end of your taxable year have in your employ more than eight individuals? (Answer "Yes" or "No") No If answer is "Yes," have you in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate after October 3, 1942? (Answer "Yes" or "No") No If answer to second question is "Yes," attach a statement explaining all such increases or decreases. If any of such increases or decreases required the prior approval of the National War Labor Board or the Commissioner of Internal Revenue as stated in Instruction 9, attach also a copy of the authorization for each of such increases or decreases.
6. Did the estate or trust at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No If answer is "Yes," attach schedule as required by Instruction N.
7. If return is for a trust, state name and address of grantor _____
8. If return is for an estate, has a United States Estate Tax Return been filed? (Answer "Yes" or "No") Yes If answer is "No," will such a return be filed? "Yes" ☐ "No" ☐ "Uncertain" ☐ (Check which.)

AFFIDAVIT (See Instruction F)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Adolph C. Meyer
(Signature of person (other than taxpayer) who prepared return)

March 10, 1943
(Date)

ESTATE OF ISADORE ZELLERBACH, DECEASED
David Zellerbach
(Signature of fiduciary preparing return) (Title)

Certified Public Accountant
(Place of firm or employer, if any)

345 Sansome Street, San Francisco, Calif.
Subscribed and sworn to before me this _____ day of _____, 194____.

Subscribed and sworn to before me this _____ day of _____, 194____.

SHORT-TERM CAPITAL GAINS AND LOSSES -- ASSETS HELD NOT MORE THAN 6 MONTHS.

4,000 San Diego El Cortes Bonds
50 Studebaker Corporation - Common

Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)

LONG-TERM CAPITAL GAINS AND LOSSES -- ASSETS HELD FOR MORE THAN 6 MONTHS

35,000 Abitibi Power & Paper Bonds
5,000 Consolidated Paper Corp. Bonds
5,000 San Diego El Cortes Bonds
100 American Hawaiian Steamship
34 American Telephone & Telegraph Co.
50 American Trust Company - Pfd.
80 Anglo California National Bank
1 Bank of America - Common
1 Bank of America - Preferred
151 Borden Company
100 Calamba Sugar Estate
1200 California Cotton Mills
1172 California Ink Co.
14 California Packing Corp. - Pfd.
50 Chase National Bank
100 Chesapeake & Ohio R.R. - Common
2 Chesapeake & Ohio R.R. - Pfd.
50 Clorox Chemical Co.
100 Consolidated Paper Corp. - Common
488 Green Zellorbach Corporation - Pfd.
52 E. I. du Pont de Nemours
757 Englander Drayage Co.
2 General Motors - Common
150 Golden State Company
50 S. & S. Corp - Preferred
24 Hawaiian Pineapple
59 Hawley Paly & Paper - Pfd.
100 Honolulu Oil Corporation
200 P. Lorillard Company
110 Lyons-Magnus, Inc.
100 Market Street Railway - Prior Pfd.
50 National City Bank

| | Date Acquired | Date Sold | Sales Price | Cost | Gain or Loss | Per- cent- age | Amount |
|--|------------------|--------------|----------------|-----------|-----------------|----------------------|----------|
| | 8/7/41 | 1/15/42 | 1,600.00 | 1,480.00 | 120.00 | 100% | 120.00 |
| | | 12/28/42 | 269.00 | 606.05 | 337.05 | 100% | 337.05 |
| | | | | | (below) | | 217.05 |
| | 8/7/41 | Dec. 1942 | 18,987.15 | 15,767.50 | 3,219.65 | 50% | 1,609.82 |
| | 8/7/41 | 10/28/42 | 2,474.55 | 2,750.00 | 275.45 | 50% | 137.78 |
| | 8/7/41 | Dec. 1942 | 3,400.00 | 1,850.00 | 1,550.00 | 50% | 775.00 |
| | 8/7/41 | 12/24/42 | 3,112.16 | 3,542.50 | 450.34 | 50% | 225.17 |
| | 8/7/41 | 12/29/42 | 4,225.35 | 5,236.00 | 1,010.65 | 50% | 505.32 |
| | 8/7/41 | 12/28/42 | 2,482.00 | 2,500.00 | 18.00 | 50% | 9.00 |
| | 8/7/41 | 12/29/42 | 674.00 | 680.00 | 6.00 | 50% | 3.00 |
| | 8/7/41 | 12/24/42 | 29.50 | 38.50 | 9.00 | 50% | 4.50 |
| | 8/7/41 | 12/24/42 | 45.50 | 50.00 | 4.50 | 50% | 2.25 |
| | 8/7/41 | 12/29/42 | 3,288.47 | 3,020.00 | 268.47 | 50% | 134.24 |
| | 8/7/41 | 12/24/42 | 341.00 | 650.00 | 309.00 | 50% | 154.50 |
| | 8/7/41 | 9/14/42 | 30,000.00 | 16,800.00 | 13,200.00 | 50% | 6,600.00 |
| | 8/7/41 | 12/24/42 | 29,581.28 | 48,952.00 | 18,470.72 | 50% | 9,235.36 |
| | 8/7/41 | 12/24/42 | 731.00 | 742.00 | 11.00 | 50% | 5.50 |
| | 8/7/41 | 12/29/42 | 1,352.50 | 1,675.00 | 322.50 | 50% | 161.25 |
| | 8/7/41 | 12/29/42 | 3,241.24 | 3,787.50 | 546.26 | 50% | 273.13 |
| | 8/7/41 | 12/29/42 | 181.75 | 200.00 | 18.25 | 50% | 9.12 |
| | 8/7/41 | 12/28/42 | 1,777.25 | 1,975.00 | 197.75 | 50% | 98.87 |
| | 8/7/41 | 12/29/42 | 243.00 | 250.00 | 7.00 | 50% | 3.50 |
| | 8/7/41 | 8/19/42 | 39,975.04 | 38,064.00 | 1,891.04 | 50% | 945.52 |
| | 8/7/41 | 12/29/42 | 6,969.30 | 8,307.00 | 1,337.70 | 50% | 668.85 |
| | 8/7/41 | 12/29/42 | 9,882.46 | 5,299.00 | 4,583.46 | 50% | 2,291.73 |
| | 8/7/41 | 12/24/42 | 82.75 | 79.75 | 3.00 | 50% | 1.50 |
| | 8/7/41 | 12/27/42 | 1,837.25 | 1,993.75 | 243.50 | 50% | 121.75 |
| | 8/7/41 | 12/28/42 | 4,467.58 | 4,850.00 | 217.50 | 50% | 108.75 |
| | 8/7/41 | 12/28/42 | 286.00 | 293.00 | 67.00 | 50% | 33.50 |
| | 8/7/41 | 12/30/42 | 5,488.00 | 6,667.00 | 1,229.00 | 50% | 619.50 |
| | 8/7/41 | 12/29/42 | 1,478.00 | 1,377.00 | 101.00 | 50% | 50.50 |
| | 8/7/41 | 12/29/42 | 3,191.94 | 3,600.00 | 408.06 | 50% | 204.03 |
| | 8/7/41 | 12/29/42 | 603.80 | 605.00 | 1.20 | 50% | .60 |
| | 8/7/41 | 12/29/42 | 763.00 | 800.00 | 37.00 | 50% | 18.50 |
| | 8/7/41 | 12/28/42 | 1,377.50 | 1,437.50 | 60.00 | 50% | 30.00 |

45

LOSSES FROM SALES OR EXCHANGE OF CAPITAL ASSETS

| | Date Acquired | Date Sold | Sales Price | Cost | Gain or Loss | Per- cent- age | Amount |
|--|------------------|--------------|----------------|----------|-----------------|----------------------|-----------------|
| 300 North American Oil Consolidated | 8/7/41 | 12/29/42 | 2,117.50 | 2,400.00 | 282.50 | 50% | 141.25 |
| 1500 Occidental Petroleum | 8/7/41 | 12/28/42 | 76.00 | 180.00 | 104.00 | 50% | 52.00 |
| 50 Pacific American Fire | 8/7/41 | 12/29/42 | 4.50 | 12.50 | 8.00 | 50% | 4.00 |
| 40 Pacific Lighting Corp. | 8/7/41 | 12/29/42 | 1,265.00 | 1,440.00 | 175.00 | 50% | 87.50 |
| 75 Pennroed Corporation | 8/7/41 | 12/29/42 | 228.38 | 243.75 | 15.37 | 50% | 7.69 |
| 800 State Guaranty Corporation - Pfd. | 8/7/41 | 12/29/42 | 290.40 | 220.00 | 70.40 | 50% | 35.20 |
| 100 Tide Water Associated Oil - Pfd. | 8/7/41 | 12/28/42 | 9,465.00 | 9,650.00 | 185.00 | 50% | 92.50 |
| 3 Transamerica Corporation | 8/7/41 | 12/29/42 | 17.00 | 13.50 | 3.50 | 50% | 1.75 |
| 9268 Traung Investment Company | 8/7/41 | 12/28/42 | 18,906.72 | 3,243.00 | 15,663.72 | 50% | 7,831.86 |
| 100 Union Bag & Paper Corporation | 8/7/41 | 12/29/42 | 750.50 | 1,162.50 | 412.00 | 50% | 206.00 |
| 450 Union Oil Company of California | 8/7/41 | 12/29/42 | 6,670.44 | 6,975.00 | 304.56 | 50% | 152.18 |
| 150 Universal Consolidated Oil | 8/7/41 | 12/29/42 | 1,244.75 | 1,125.00 | 119.75 | 50% | 59.87 |
| 250 Waielus Agricultural Company | 8/7/41 | 12/29/42 | 5,562.50 | 6,625.00 | 1,062.50 | 50% | 531.25 |
| 40 William Taylor Corporation | 8/7/41 | 0 & 1/2 | 2,800.00 | 1,280.00 | 1,520.00 | 50% | 760.00 |
| Total net long-term capital gain or loss (enter in line 2, column 3, of summary below) | | | | | | | <u>7,659.25</u> |

a-6

taxpayer received from John Elsbach of Los Angeles \$1.00 per share for an option on 1,200 shares of California Cotton Mills stock, making a total sum of \$1,200.00. The option was for a definite length of time. The option was not exercised and at its expiration an extension was granted. The deal was not concluded inasmuch as the optionee failed to pay the balance due. Subsequently the stock was sold to a third person having no connection with Mr. Elsbach. Thereupon taxpayer authorized the return of the \$1.00 per share to Mr. Elsbach and gave the money to a third person for this purpose. Taxpayer asserts that the sum of \$1,200.00 is not taxable income under the Internal Revenue Code.

a.7

44

45

F-1209423 Page 1
1942

Form 1041
Treasury Department
Internal Revenue Service

AMENDED RETURN
UNITED STATES

FIDUCIARY INCOME TAX RETURN

(FOR ESTATES AND TRUSTS)
For Calendar Year 1942

or fiscal year beginning 1942, and ending 1943

File this return not later than the 15th day of the third month following the close of the taxable year.

(PRINT NAMES AND ADDRESS PLAINLY BELOW)

Name of Estate or Trust ESTATE OF ISADORE ZELLERBACH, DECEASED
J. DAVID ZELLERBACH AND HAROLD L. ZELLERBACH, SURVIVING EXECUTORS
343 Sansome Street
San Francisco, California

Name and Address of Fiduciary

(Do Not Use These Spaces)

File Code 3205

Serial No. 1-104

District 1-104

DEC 14 1942

Cash ☐ Check ☐ M. O. ☐

FIRST PAYMENT

| INCOME | | | |
|--|--|-------------|-------------|
| 1. Dividends | | \$23 152 80 | |
| 2. Interest on bank deposits, notes, etc. | | 1 099 46 | |
| 3. Interest on corporation bonds, etc., (except interest to be reported in item 4) | | 845 90 | |
| 4. Interest on tax-free covenant bonds upon which a Federal tax was paid at source | | | |
| 5. Interest on Government obligations, etc.: (a) From lines (e), (f), and (g), column 3 (a), Schedule B | | | |
| (b) From line (A) Schedule B | | | |
| (c) From line (f) Schedule B | | | |
| 6. Income (or loss) from partnerships, syndicates, pools, etc., and income from other fiduciaries (Name and address) | | 3 178 42 | |
| 7. Rents and royalties (from Schedule C) | | 2 747 50 | |
| 8. (a) Net gain (or loss) from sale or exchange of capital assets (from Schedule E) | | 7 432 59 | |
| (b) Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule F) | | | |
| Net profit (or loss) from trade or business (attach statement) | | | |
| 10. Other income (state nature of income) | | 225 00 | |
| 11. Total income in items 1 to 10 (enter nontaxable income in Schedules B and F) | | | 3338 681 67 |
| DEDUCTIONS | | | |
| 12. Interest (explain in Schedule C) | | \$ 1 909 71 | |
| 13. Taxes (explain in Schedule C) | | 13 566 01 | |
| 14. Other deductions authorized by law (explain in Schedule C) | | 449 62 | |
| 15. Total deductions in items 12 to 14 | | | 15 925 34 |
| 16. Balance (item 11 minus item 15) | | | 3322 756 33 |
| 17. Less amount distributable to beneficiaries (item 5 (a), above, plus total of column 2, Schedule A) | | | 315 323 76 |
| 18. Net income (taxable to fiduciary) (item 16 minus item 17) | | | \$ 7 432 59 |

| COMPUTATION OF TAX | | | |
|--|-------------|--|-------------|
| 19. Net income (item 18 above) | \$ 7 432 59 | 27. Total tax (item 26 or line 14, Schedule E) | \$ 1 619 78 |
| 20. Less: Personal exemption | | 28. Less: Fiduciary's share of income tax paid at source | |
| 21. Balance (surtax net income) | \$ 7 432 59 | 29. Fiduciary's share of income tax paid to a foreign country or United States possession (Attach Form 1116) | |
| 22. Less: Interest on Government obligations, etc. (item 5 (b), above) | | | |
| 23. Balance subject to normal tax | \$ 7 432 59 | | |
| 24. Normal tax (6% of item 23) | \$ 445 96 | | |
| 25. Surtax on item 21 | \$ 1 203 26 | | |
| 26. Total (item 24 plus item 25) | \$ 1 619 78 | 30. Balance of tax (item 27 minus items 28 and 29) | \$ 1 619 78 |

Schedule D.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, E, AND F. (See Instruction 1)

| 1. Kind of property (if building, state amount of which is exempt) | 2. Date acquired | 3. Cost or other basis (do not include land or other nondepreciable property) | 4. Amount fully depreciated in tax at end of year | 5. Depreciation allowed (or allowable) in prior years | 6. Depreciation not or other basis to be recovered | 7. Estimated life and to be depreciated | 8. Estimated depreciation taken from beginning of year | 9. Depreciation allowable this year |
|--|------------------|---|---|---|--|---|--|-------------------------------------|
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |

Schedule E.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 8)

| 1. Kind of property (if necessary, attach statement of depreciation details with column 1) | 2. Date acquired Mo. Day Year | 3. Date sold Mo. Day Year | 4. Gross sales price (minus sales gains) | 5. Cost or other basis | 6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913 | 7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (caption in Schedule D) | 8. Gain or loss (indicate 4 plus column 7 minus the sum of columns 5 and 6) | Gain or loss to be taken into account | |
|--|----------------------------------|------------------------------|--|------------------------|--|---|---|---------------------------------------|------------|
| | | | | | | | | 9. Percentage | 10. Amount |

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS

| | | | | | | | | | |
|--|--|--|--|--|--|--|--|-----|--|
| | | | | | | | | 100 | |
| | | | | | | | | 100 | |
| | | | | | | | | 100 | |
| | | | | | | | | 100 | |

Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

| | | | | | | | | | |
|--|--|--|--|--|--|--|--|----|--|
| | | | | | | | | 50 | |
| | | | | | | | | 50 | |
| | | | | | | | | 50 | |
| | | | | | | | | 50 | |

Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)

SUMMARY OF CAPITAL GAINS OR LOSSES

| 1. Classification | 2. Net short-term capital loss of preceding taxable year (not in excess of net income for such year), but only to extent of net short-term capital gain of current year | 3. Net gain or loss to be taken into account from column 10, above | | 4. Net gain or loss to be taken into account from partnership and common trust funds | | 5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary | |
|---|---|--|----------|--|----------|---|----------|
| | | (a) Gain | (b) Loss | (a) Gain | (b) Loss | (a) Gain | (b) Loss |
| 1. Total net short-term capital gain or loss | | | | | | | |
| Total net long-term capital gain or loss | | | | | | | |
| 2. Net gain in column 5, lines 1 and 2. (Enter as item 8(a), page 1) | | | | | | | |
| 4. Net loss in column 5, lines 1 and 2. (The amount to be entered as item 8(a), page 1, is (1) this item or (2) net income, computed without regard to capital gains or losses, or (3) \$1,000, whichever is smallest.) | | | | | | | |

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term capital gain over net short-term capital loss and item 21, page 1, exceeds \$18,000

| | | | |
|---|--|--|--|
| 1. Net income (item 18, page 1) | | 8. Normal tax (6% of line 7) | |
| 2. Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), minus line 1, column 5 (b), of summary above) | | 9. Surtax on line 5. (See Instruction 25) | |
| 3. Ordinary net income (line 1 minus line 2) | | 10. Partial tax (line 8 plus line 9) | |
| 4. Less: Personal exemption (item 20, page 1) | | 11. 50% of line 2 | |
| 5. Balance (surtax net income) | | 12. Alternative tax (line 10 plus line 11) | |
| 6. Less: Interest on Government obligations, etc. (item 5 (b), page 1). (See Instruction 22) | | 13. Total normal tax and surtax (item 26, page 1) | |
| 7. Balance subject to normal tax | | 14. Tax liability (line 12 or line 13, whichever is the lesser) (Enter as item 27, page 1) | |

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items in Schedule E:

If any of the items were acquired by you other than by purchase, explain fully how acquired:

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:

Schedule H.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See instruction 11)

QUESTIONS

AFFIDAVIT (See Instruction F)
I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to best of my knowledge and belief, is a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

(Name of firm or employer, if any)

(Signature of officer administering oath)

(Tele)

(Signature of officer administering oath)

Table 1

a. 11

ESTATE OF ISADORE ZELLERBACH
STATEMENT WITH RESPECT TO AMENDED RETURN FOR 1942

On December 7, 1942 the Superior Court in and for the City and County of San Francisco granted a partial distribution of income, \$181,000.00, requested by the legatees of Isadore Zellerbach. In computing taxable income of the Estate for 1942, said sum was deducted as income distributed to legatees of the Estate.

Sec. 29.162-2 of Regulations 111 provides that "income which becomes payable" means income to which the legatee has a present right whether or not such income is actually paid. Inasmuch as the legatees had such right and exercised it even tho not for the full amount of the income, the Estate is filing an amended return for 1942 and a claim for taxes paid thereon and is advising the legatees that the distributive share of each one should be included in his individual income tax return for 1942. *****

Schedules supporting income and deductions, also details of non-taxable income, are on the original return and not reproduced herewith.



Page 2

Schedule A.—BENEFICIARIES' SHARES OF INCOME AND CREDITS. (Include as beneficiaries persons to whom amounts were paid or set aside for religious, charitable, etc., purposes.) (See instructions 4 and 16)

| 1. Name and address of each beneficiary (Designate immediate class) | 2. Taxable income exclusive of interest on Government obligations subject to cur- rent only, and dividends to be reported in column 9 | 3. Federal income tax paid at source (2% of gross amount in item 2, page 1, less item 30, page 1) | 4. Income and profits taxes paid to a foreign country or United States possession |
|--|--|---|---|
| (a) | \$ | \$ | \$ |
| (b) | | | |
| (c) | | | |
| (d) | | | |
| (e) | | | |
| (f) | | | |
| (g) | | | |
| (h) | | | |
| Total of beneficiaries' shares | \$ | \$ | \$ |

CONTINUATION OF SCHEDULE A.—BENEFICIARIES' SHARES OF INCOME AND CREDITS

| 5. Use letter corresponding to class to identify beneficiary | 6. Wholly tax-exempt obligations (shares of the sum of lines 6a, 6b, 6c, and 6d of Schedule B) | | Partially tax-exempt | | | | 9. Dividends on share accounts of Federal savings and loan associations (shares of line 6d, column 2, Schedule B) |
|--|--|-------------|----------------------|---|--------------|---|---|
| | a. Principal | b. Interest | a. Principal | b. Interest less amortizable bond premium | a. Principal | b. Interest less amortizable bond premium | |
| | \$ | \$ | \$ | \$ | \$ | \$ | \$ |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| Total | \$ | \$ | \$ | \$ | \$ | \$ | \$ |

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See instruction 4)

| 1. Obligations or securities | 2. Amount owned at end of year | 3. Interest (and dividends subject to current only) received or accrued during the year | 4. Federal income tax paid at source (amount of interest exempt from taxation) | 5. Federal income tax credit for interest on current only |
|--|--------------------------------|---|--|---|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions | \$ | \$ | All | XXXXXX XX |
| (b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended | | | All | XXXXXX XX |
| (c) Obligations of United States issued on or before September 1, 1917 | | | All | XXXXXX XX |
| Treasury Notes issued prior to December 1, 1940, Treasury Bills and Treasury Certificates of Indebtedness issued prior to March 1, 1941 | | | All | XXXXXX XX |
| (d) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941 | | | \$ | \$ |
| (e) Obligations of instrumentalities of the United States (other than obligations to be reported in (d) above) issued prior to March 1, 1941 | | | None | |
| (f) Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 28, 1942 | XXXXXX XX | | | XXXXXX |
| (g) Total. (Include in item 4 (b), page 1) | | | | \$ |

| 6. Treasury Notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof. (Enter amount of interest as item 4 (c), page 1) | Amount owned at end of year | Interest received or accrued during the year (subject to current tax and credits) |
|--|-----------------------------|---|
| | \$ | \$ |

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See instruction 6)

| 1. Kind of property | 2. Amount | 3. Depreciation (caption in Schedule D) | 4. Repairs (caption below) | 5. Other expenses (caption below) | 6. Net profit. (Enter on line 6, page 1) |
|---------------------|-----------|---|----------------------------|-----------------------------------|--|
| | \$ | \$ | \$ | \$ | \$ |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

Explanation of deductions claimed in columns 4 and 5

Schedule D—DECLARATION OF REDUCTION FOR DEFERRATION CLAIMED IN SCHEDULE C, K, AND E. (See Instructions 7)

| 1. Kind of property (if realty, attach statement of description details not shown below) | 2. Date acquired | 3. Date sold | 4. Gross sales price (contract price) | 5. Cost or other basis | 6. Depreciation allowed (or allowable) since acquisition or January 1, 1913 (include in Schedule D) | 7. Gain or loss (net gain 4 plus column 6 less the sum of columns 3 and 5) | 8. Gain or loss to be taken into account |
|--|------------------|--------------|---------------------------------------|------------------------|---|--|--|
| | Mo. Day Year | Mo. Day Year | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

Schedule E—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instructions 7)

| 1. Kind of property (if realty, attach statement of description details not shown below) | 2. Date acquired | 3. Date sold | 4. Gross sales price (contract price) | 5. Cost or other basis | 6. Expenses of sale and cost of improvements subsequent to acquisition or January 1, 1913 (include in Schedule D) | 7. Depreciation allowed (or allowable) since acquisition or January 1, 1913 (include in Schedule D) | 8. Gain or loss (net gain 4 plus column 6 less the sum of columns 3 and 5) | 9. Percentage | 10. Amount |
|--|------------------|--------------|---------------------------------------|------------------------|---|---|--|---------------|------------|
| | Mo. Day Year | Mo. Day Year | | | | | | | |

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS

| | | | | | | | | | |
|---|--|--|--|--|--|--|--|-----|--|
| | | | | | | | | 100 | |
| | | | | | | | | 100 | |
| | | | | | | | | 100 | |
| | | | | | | | | 100 | |
| Total net short-term capital gain or loss (enter in line 1, column 2, of summary below) | | | | | | | | | |

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

| | | | | | | | | | |
|--|--|--|--|--|--|--|--|----|--|
| | | | | | | | | 50 | |
| | | | | | | | | 50 | |
| | | | | | | | | 50 | |
| | | | | | | | | 50 | |
| Total net long-term capital gain or loss (enter in line 2, column 2, of summary below) | | | | | | | | | |

SUMMARY OF CAPITAL GAINS OR LOSSES

| 1. Classification | 2. Net gain or loss to be taken into account from column 10, above | | 3. Net gain or loss to be taken into account from partnership and common trust funds | | 4. Total net gain or loss taking into account in columns 2 and 3 of this summary | |
|---|--|----------|--|----------|--|----------|
| | (a) Gain | (b) Loss | (a) Gain | (b) Loss | (a) Gain | (b) Loss |
| 1. Total net short-term capital gain or loss | | | | | | |
| 2. Total net long-term capital gain or loss | | | | | | |
| 3. Capital loss carry-over (attach statement) | | | | | | |
| 4. Net gain in column 4, lines 1, 2, and 3. (Enter as item 7 (a), page 1) | | | | | | |
| 5. Net loss in column 4, lines 1, 2, and 3. (The amount to be entered as item 7 (a), page 1, is (1) this item or (2) net income, computed without regard to capital gains or losses, or (3) \$1,000, whichever is smallest) | | | | | | |

COMPUTATION OF ALTERNATIVE TAX

| | | | |
|--|--|--|--|
| 1. Net income (item 17, page 1) | | 8. Normal tax (6% of line 7) | |
| 2. Excess of net long-term capital gain over net short-term capital loss (line 2, column 4 (a), less the sum of line 1, column 4 (b), and line 3 of summary above) | | 9. Surtax on line 8. (See Instructions 25) | |
| 3. Ordinary net income (line 1 less line 2) | | 10. Partial tax (line 8 plus line 9) | |
| 4. Less: Personal exemption (item 20, page 1) | | 11. 50% of line 2 | |
| 5. Balance (surtax net income) | | 12. Alternative tax (line 10 plus line 11) | |
| 6. Less: Interest on Government obligations, etc. (item 4 (b), page 1) | | 13. Total normal tax and surtax (item 24 plus item 25, page 1) | |
| 7. Balance subject to normal tax | | 14. Tax liability (line 12 or line 13, whichever is the lower). (Enter as item 26, page 1) | |

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items in Schedule E:

If any of the items were acquired by you other than by purchase, explain fully how acquired:

Schedule F—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instructions)

| 1. Kind of property | 2. Date acquired | 3. Gross sales price (net of cost) | 4. Cost or other basis | 5. Expenses of sale and cost of improvements, other than depreciation or amortization (See Instructions) | 6. Depreciation allowed (See Instructions) | 7. Gain or loss |
|---------------------|------------------|------------------------------------|------------------------|--|--|-----------------|
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

Total net gain (or loss). (Enter on line 7 (b), page 7)

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items.
If any of the above items were acquired by you other than by purchase, explain fully how acquired.

Schedule G—EXPLANATION OF REDUCTIONS CLAIMED IN ITEMS 11, 12, and 13. (See Instructions 11, 12, and 13)

| 1. Item No. | 2. Explanation | 3. Amount | 4. Item No. (continued) | 5. Explanation (continued) | 6. Amount (continued) |
|-------------|----------------|-----------|-------------------------|----------------------------|-----------------------|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

Schedule H—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE E. (See Instructions 14)

| 1. Source of income | 2. Nature of income | 3. Amount |
|---------------------|---------------------|-----------|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

QUESTIONS

1. Was a return of income filed for the preceding year? Yes. If so, to which collector's office was it sent? San Francisco.
2. Date estate or trust was created August 7, 1941.
3. If copy of will or trust instrument and statement required under Instruction I have been previously furnished, state when and where filed.
4. Check whether this return was prepared on the cash (For annual ☐ basis).
5. Did the estate or trust at any time during its taxable year have in its employ more than eight individuals? (Answer "Yes" or "No") No. If answer is "Yes," has the estate or trust in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? (Answer "Yes" or "No") _____. If answer to second question is "Yes," attach a statement explaining all such increases or decreases. If any of such increases or decreases re-
- quired the prior approval of the National War Labor Board or the Commissioner of Internal Revenue as stated in Instruction 6, attach also a copy of the authorization for each of such increases or decreases.
6. Did the estate or trust at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No. If answer is "Yes," attach schedule as required by Instruction Q.
7. If return is for a trust, state name and address of grantor _____.
8. If return is for an estate, has a United States Estate Tax Return been filed? (Answer "Yes" or "No") Yes. If answer is "No," will such a return be filed? "Yes" ☐ "No" ☐ "Uncertain" ☐ (Check which.)

AFFIDAVIT (See Instruction F)

I swear (or affirm) that this return (including any accompanying schedule and statements) has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return.

Joseph C. Meyer 1944
(Signature of preparer or other person signing) (Date)

CERTIFIED PUBLIC ACCOUNTANT.
(Place of firm or employer, if any)

Subscribed and sworn to before me this 19th day of February, 1944
John M. Williams
(Signature of official before whom sworn)

Subscribed and sworn to before me this 15th day of March, 1944
Genevieve Stoh
(Signature of official before whom sworn)

ESTATE OF ISADORE ZELLERBACH - 1943

SCHEDULE G

INTEREST

Net Income
I T V T

| | | | |
|---------------------|-----------------|---------------------|--------------|
| State of California | \$ 78.10 | | |
| Wells Fargo Bank | 10,739.87 | | |
| Province of Quebec | 52.58 | | |
| J. B. Zellerbach | <u>5,000.00</u> | <u>\$ 15,920.55</u> | \$ 15,920.55 |

TAXES

| | | | |
|--------------------|---------------|---------------------|--------|
| Social security | \$ 25.34 | | |
| Real property | 623.84 | | |
| Auto | 22.70 | | |
| Documentary stamps | <u>269.05</u> | 940.93 | 940.93 |
| California income | | <u>15,483.16</u> | |
| | | <u>\$ 16,424.09</u> | |

OTHER DEDUCTIONS

| | | | |
|------------------|-----------------|-----------------|---------------------|
| Bookkeeper | \$ 2,508.60 | | |
| Insurance | 5.02 | | |
| K'Thanga expense | 106.71 | | |
| Audit | 1,000.00 | | |
| Commissions | <u>3,000.00</u> | <u>6,620.33</u> | <u>6,620.33</u> |
| | | | <u>\$ 23,481.81</u> |

SCHEDULE A

Federal State

| | | |
|--|---------------------|---------------------|
| Jennie B. Zellerbach, 343 Sansome Street, S.F. | \$ 92,664.15 | \$100,405.73 |
| J. D. Zellerbach, 343 Sansome Street, S.F. | 30,808.05 | 33,468.58 |
| Harold Zellerbach, 343 Sansome Street, S.F. | 30,808.05 | 33,468.58 |
| Claire Z. Saroni, 343 Sansome Street, S.F. | <u>30,808.05</u> | <u>33,468.57</u> |
| | <u>\$185,328.30</u> | <u>\$200,811.46</u> |

NOTE: On December 13, 1943 a distribution of income, \$26,000.00 was authorized by court order to J. D. and Harold Zellerbach and Claire Saroni. The net income of the estate is deemed to be distributable under Section 162-2 of Regulations 111.

ESTATE OF ISADORE ZELLERBACH - 1943

SCHEDULE E

SBS LONG TERM

| | Date Acquired | Date Sold | Proceeds | Cost | Gain |
|---|------------------|--------------|-------------|-------------|-------------|
| 104 National Automotive Fibres Inc. | Aug 7/41 | May 22 | \$46,041.25 | \$19,216.00 | \$26,825.25 |
| 125 Steepler Printing Lithograph Corp. Pfd. | do | Apr 22 | 11,250.00 | 12,500.00 | (1,250.00) |
| 125 Sunset Press | do | Jan 13 | 11,385.00 | 6,325.00 | 5,060.00 |
| 1170 Thomas Allee Corp - A | do | Jun 11 | 1,392.20 | 514.80 | 877.50 |
| 200 Wilson Jones Company | do | Mar 14 | 2,119.62 | 1,600.00 | 519.62 |
| \$9500 San Diego--El Cortez | do | Jun 1 | \$ 617.50 | 3,515.00 | 5,102.50 |

Recognized--Federal - 50%

do --California - 80%

RENTS

Two Street lots
rentals

\$ 945.00
176.75

\$ 768.22

PARTNERSHIP

Zellerbach - Lawson

\$ 2,395.05

EXHIBIT E

In the Superior Court of the State of California in
and for the City and County of San Francisco.

Dept. 9—No. 87721

In the Matter of the Estate of

ISADORE ZELLERBACH

Deceased.

PETITION FOR PARTIAL DISTRIBUTION

To the Honorable, the Superior Court of the State
of California, in and for the City and County of
San Francisco :

The Petition of J. David Zellerbach and Harold
L. Zellerbach respectfully shows :

1. That your petitioners are the duly appointed, qualified and acting executors of the last will and testament of Isadore Zellerbach, deceased.
2. That said decedent died testate, and letters testamentary were issued to your petitioners and to Marcus M. Baruh, now deceased, on September 2, 1941; that more than four months have elapsed since the issuance of such letters testamentary.
3. That the total value of said estate, as shown by the inventory and appraisal on file herein, is \$4,754,671.56; that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and [56] paid; that the expenses of administration have not been paid as yet, but there will be sufficient assets

with which to pay said expenses of administration, even if the legacies hereinafter described are allowed and paid.

4. That the inheritance taxes due the State of California have not been determined as yet; that the petitioners are informed and believe, and therefore allege that the State Controller will consent in writing to a partial distribution; that all personal property taxes due and payable by said estate have been paid.

5. That under the provisions of the last will and testament of decedent, admitted to probate herein, it is provided as follows:

“I hereby give and bequeath to each of my grandchildren, Jane Saroni (now known as Jane Saroni Washburn), Louis Saroni and A. B. Saroni, Jr., (children of my daughter, Claire Zellerbach Saroni) and James D. Zellerbach and Richard C. Zellerbach, (sons of my son, J. David Zellerbach) and William J. Zellerbach, Rolinde Zellerbach, (now known as Rolinde Zellerbach Loew) and Stephen Anthony Zellerbach, (children of my son, Harold L. Zellerbach), the sum of five thousand dollars (\$5,000) making a total of forty thousand dollars (\$40,000); provided, however, that said legacies may be paid by my executors either in cash or in shares of stock or other securities belonging to my estate which, in the opinion of my executors, shall be of the value mentioned, or partly in cash and partly in such shares of stock or other securities as my executors may determine,

and provided further that said legacies shall not become due until and shall not be paid until my executors shall have cash or such shares of stock or other securities on hand or which, in their opinion, shall be available for the payment or satisfaction of said legacies.”

6. That the residue of the estate of decedent is distributed, one-half to Jennie B. Zellerbach, widow of decedent, and one-half, equally between J. David Zellerbach, Harold L. Zellerbach and Claire Z. Saroni, children of decedent.

7. That your petitioners hereby request the distribution of the legacies to the grandchildren, hereinabove described; that [57] it is not proposed to distribute at this time any of the residue of the estate; that as provided in said will the executors, your petitioners herein, may pay said legacies either in cash or in shares of stock, or other securities belonging to the estate, or partly in cash and partly in such shares of stock, or other securities, as the executors may determine; that the executors desire to pay said legacies by delivering to each of said grandchildren, so designated, sixty-one (61) shares of the preferred capital stock of Crown Zellerbach Corporation, all of which shares of stock are in the hands of the executors, and the sum of \$5.62 in cash; that the average market price on the San Francisco Stock Exchange between the bid and asking prices for said stock as of the date of this petition, to-wit, August 18, 1942, is $81\frac{7}{8}$, or for said sixty-one (61) shares a total value of \$4,994.38, which, with said

sum of \$5.62 in cash to be distributed to each of said grandchildren, equals the sum of \$5,000.00, the amount of their respective legacies.

8. That all of the aforesaid legacies may be distributed without injury to the estate or any person interested therein, and your petitioners request that the court dispense with the necessity of any legatee executing and filing a bond to your petitioners.

Wherefore, petitioners pray that the clerk of the above entitled court shall set this petition for hearing by the court; that notice of the time and place of such hearing shall be given in the manner and form required by law; that an order be made distributing to each of the following persons, to-wit: Jane Saroni Washburn, Louis Saroni and A. B. Saroni, Jr., James D. Zellerbach, Jr., Richard C. Zellerbach, William J. Zellerbach, Rolinde Zellerbach Loew and Stephen Anthony [58] Zellerbach, sixty-one (61) shares of the preferred stock of Crown Zellerbach Corporation and the sum of Five and 62/100 dollars (\$5.62) in cash, in full payment and discharge of their respective legacies in the above entitled estate; that the court make an order dispensing with the execution and filing of a bond by any of said persons, and that this court make all necessary orders as may be meet and proper in the premises.

/s/ J. DAVID ZELLERBACH,

/s/ HAROLD L. ZELLERBACH,

Executors and Petitioners.

/s/ PHILIP S. EHRLICH,

Attorney for Executors and
Petitioners. [59]

State of California,
City and County of San Francisco—ss.

J. David Zellerbach and Harold L. Zellerbach,
being duly sworn, each for himself and not one for
the other, depose and say:

That he has read the within and foregoing Peti-
tion for Partial Distribution and knows the contents
thereof; that the same is true of his own knowledge,
except as to the matters therein stated on informa-
tion and belief, and as to those matters he believes
it to be true.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH.

Subscribed and sworn to before me this 19th day
of August, 1942.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 19, 1942.

EXHIBIT F

In the Superior Court of the State of California in
and for the City and County of San Francisco.

Dept. 9. No. 87721.

In the Matter of the Estate of

ISADORE ZELLERBACH,

Deceased.

ORDER AND DECREE FOR PARTIAL
DISTRIBUTION

J. David Zellerbach and Harold L. Zellerbach, Executors of the Last Will and Testament of Isadore Zellerbach, deceased, having filed herein on the 19th day of August, 1942, their petition praying for a partial distribution of the above entitled estate, and said petition this day coming on regularly to be heard, and proof having been made to the satisfaction of the court, the court finds that notice of hearing of said petition has been regularly given for the period and in the manner and form required by law;

The court, after hearing the evidence, finds that all the allegations of said petition are true; that the time for filing claims against said estate has expired; that all claims which have been filed, have

been allowed, approved and paid; that the State Controller of the State of California has consented, in writing, [61] to a partial distribution of said estate; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;

It is Therefore Hereby Ordered, Adjudged and Decreed that said J. David Zellerbach and Harold L. Zellerbach, executors of the last will and testament of Isadore Zellerbach, deceased, pay and deliver to the persons hereinafter named their respective legacies under the last will and testament of decedent, which legacies are in the sum of Five Thousand Dollars (\$5,000) to each of said persons, and which legacies shall be paid by the delivery of sixty-one (61) shares of the preferred capital stock of Crown Zellerbach Corporation and the sum of Five and 62/100 dollars (\$5.62) in cash to each of the following persons: Jane Saroni Washburn, Louis Saroni, A. B. Saroni, Jr., James D. Zellerbach, Jr., Richard C. Zellerbach, William J. Zellerbach, Rolinde Zellerbach Loew and Stephen Anthony Zellerbach.

It is Hereby Further Ordered that the giving of any bond by any of the persons herein named before receiving their respective legacies be, and the

same is hereby dispensed with. Done in Open Court this 2nd day of September, 1942.

T. I. FITZPATRICK,

Judge of the Superior Court.

Consent to the foregoing partial distribution is hereby granted August 19, 1942.

HARRY B. RILEY,

State Controller.

By A. W. BROUILLET,

Deputy Inheritance Tax
Attorney.

[Endorsed]: Filed Sept. 2, 1942. [62]

EXHIBIT G.

In the Superior Court of the State of California in
and for the City and County of San Francisco.

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

PETITION FOR PARTIAL DISTRIBUTION
To the Honorable, the Superior Court of the State
of California, in and for the City and County
of San Francisco:

The petition of J. David Zellerbach and Harold L.
Zellerbach respectfully shows:

1. That your petitioners are the duly appointed, qualified and acting executors of the last will and testament of Isadore Zellerbach, deceased.

2. That said decedent died testate on August 7, 1941, and Letters Testamentary were issued to your petitioners and to Marcus M. Baruh, now deceased, on September 2, 1941; that more than four months have elapsed since the issuance of such Letters Testamentary.

3. That the total value of said estate, as shown by the inventory and appraisement on file, herein, is \$4,754,671.56; [63] that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the expenses of administration have not been paid as yet, but there will be sufficient assets with which to pay said expenses, even if the distribution herein prayed for and hereinafter described is allowed and paid.

4. That the federal estate tax, as disclosed by the return, has been paid; that the inheritance taxes due the State of California have not yet been determined; that the petitioners are informed and believe, and therefore allege that the State Controller will consent in writing to the partial distribution herein prayed for; that all personal property taxes due and payable by said estate have been paid.

5. That on September 2, 1942, an order and decree for partial distribution was made and entered herein under and by virtue of the terms of which all gifts and legacies under the terms of the last will and testament of decedent were ordered to be paid; that pursuant to the terms of said decree all of said legacies have been paid.

6. That under the provisions of said last will and testament of decedent it is provided as follows:

“I hereby give, devise and bequeath unto my dear wife, Jennie B. Zellerbach, an undivided three sixths of all of the rest, residue and remainder of my estate, real and personal of which I may die seized or possessed, and I hereby give, devise and bequeath the remaining undivided three-sixths of said rest, residue and remainder of my estate to my three children, J. David, Harold L. and Claire, one-sixth to each.”

7. That it is estimated that the income from the estate of said decedent for the calendar year 1942 will approximate the sum of \$317,000.00; that the residuary legatees and the executors desire to distribute a portion of said income as follows: [64]

| | |
|---|--------------|
| (a) To Jennie B. Zellerbach, widow of decedent | \$ 22,000.00 |
| (b) To J. David Zellerbach, son of decedent | 53,000.00 |
| (c) To Harold L. Zellerbach, son of decedent.... | 53,000.00 |
| (d) To Claire Z. Saroni, daughter of decedent | 53,000.00 |

| | |
|------------|--------------|
| Total..... | \$181,000.00 |
|------------|--------------|

8. That it is not proposed at this time to distribute any of the corpus of the residue of the estate, nor any income save and except that hereinabove described; that all of said income may be distributed without injury to the estate, or any person interested therein, and your petitioners request that the court dispense with the necessity of any of said legatees executing and filing a bond to your petitioners.

Wherefore, petitioners pray that the clerk of the above entitled court shall set this petition for hearing by the court; that notice of the time and place of such hearing shall be given in the manner and form required by law; that upon such hearing an order be made and entered herein distributing from the income of the estate of said decedent for the calendar year 1942, the sum of \$181,000.00 in cash, which income is to be distributed to the persons hereinabove named, in the amounts set opposite their respective names; that the court make an order dispensing with the execution and filing of a bond by any of said persons, and that this court make all necessary orders as may be meet and proper in the premises.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH,
Executors and Petitioners.

PHILIP S. EHRLICH,
Attorney for Executors and
Petitioners.

[Endorsed] Filed Nov. 25, 1942. [65]

EXHIBIT H

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

ORDER AND DECREE FOR PARTIAL
DISTRIBUTION

J. David Zellerbach and Harold L. Zellerbach, executors of the last will and testament of Isadore Zellerbach, deceased, having filed herein on the 25th day of November, 1942, their petition praying for an order and decree of this court, authorizing them to distribute from the income of said estate for the calendar year 1942, the sum of \$181,000.00 to the persons hereinafter named in the amounts set opposite their respective names, and said petition coming on this day regularly to be heard, and proof having been made to the satisfaction of the court, the court finds that notice of the hearing of said petition has been regularly given for the period and in the manner and form required by law;

The Court, after hearing the evidence, finds that all the allegations of said petition are true; that the time for [66] filing claims against said estate has

expired; that all claims which have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to the said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;

It is Therefore Hereby Ordered, Adjudged and Decreed that said J. David Zellerbach and Harold L. Zellerbach, as executors of the last will and testament of Isadore Zellerbach, deceased, pay and deliver to the persons hereinafter named from the income of said estate, for the calendar year 1942, the total sum of \$181,000.00 in the amounts set opposite their respective names, to-wit:

| | | |
|-----|--|--------------|
| (a) | To Jennie B. Zellerbach, widow of decedent | \$ 22,000.00 |
| (b) | To J. David Zellerbach, son of decedent..... | 53,000.00 |
| (c) | To Harold L. Zellerbach, son of decedent.... | 53,000.00 |
| (d) | To Claire Z. Saroni, daughter of decedent.. | 53,000.00 |
| | | <hr/> |
| | | \$181,000.00 |

It is Hereby Further Ordered that the giving of any bond by any of the persons herein named before receiving their respective distributions of income be, and the same is hereby dispensed with.

Done in Open Court this 7th day of December, 1942.

T. I. FITZPATRICK,

Judge of the Superior Court.

Consent to the [67] foregoing distribution is hereby granted.

Dated: November 28, 1942.

HARRY B. RILEY,

State Controller.

A. W. BROUILLET,

Deputy Inheritance Tax
Collector.

[Endorsed]: Filed Dec. 7, 1942.

EXHIBIT I

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

PETITION FOR PARTIAL DISTRIBUTION

To the Honorable, the Superior Court of the State
of California, in and for the City and County
of San Francisco:

The petition of J. David Zellerbach and Harold
L. Zellerbach respectfully shows:

1. That your petitioners are the duly appointed,
qualified and acting executors of the Last Will and
Testament of Isadore Zellerbach, deceased.

2. That said decedent died testate on August 7, 1941, and Letters Testamentary were issued to your petitioners and to Marcus M. Baruh, now deceased, on September 2, 1941; that more than four months have elapsed since the issuance of such Letters Testamentary.

3. That the total value of said estate, as shown by the inventory and appraisement on file herein, is \$4,754,671.56; that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the expenses of administration have not been paid as yet, but there will be sufficient assets with which to pay said expenses, even if the distribution herein prayed for and hereinafter described is allowed and paid.

4. That the federal estate tax, as disclosed by the return, has been paid; that the inheritance taxes due the State of California have not yet been determined; that the petitioners are informed and believe, and therefore allege that the State Controller will consent in writing to the partial distribution herein prayed for; that all personal property taxes due and payable by said estate have been paid.

5. That on September 2, 1942 an order and decree for partial distribution was made and entered herein under and by virtue of the terms of which all gifts and legacies under the terms of the Last Will and Testament of decedent were ordered to be paid; that pursuant to the terms of said decree all of said legacies have been paid.

6. That under the provisions of said Last Will and Testament of decedent it is provided as follows:

“I hereby give, devise and bequeath unto my dear wife, Jennie B. Zellerbach, an undivided three-sixths of all of the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, and I hereby give, devise and bequeath the remaining undivided three-sixths of said rest, residue and remainder of my estate to my three children, J. David, Harold L. and Claire, one-sixth to each.”

7. That it is proposed to distribute at this time to the residuary legatees of said Last Will and Testament from the corpus of said estate the following shares of capital stock, constituting a portion of the assets of said estate, to wit: [70]

6000 shares of preferred stock of Crown Zellerbach Corporation; 30,000 shares of common stock of Crown Zellerbach Corporation; 9000 shares of preferred stock of Rayonier Incorporated; 12,000 shares of common stock of Rayonier Incorporated.

That it is proposed to distribute said shares of stock as follows:

One-half thereof to Jennie B. Zellerbach

One-sixth thereof to J. David Zellerbach

One-sixth thereof to Harold L. Zellerbach

One-sixth thereof to Claire Z. Saroni

Wherefore, petitioners pray that the clerk of the above-entitled court shall set this petition for hear-

by the court; that notice of the time and place of such hearing shall be given in the manner and form required by law; that upon such hearing an order be made and entered herein distributing from the assets of said estate the property herein described to the persons herein named in the proportions herein designated; that the court make an order dispensing with the execution and filing of a bond by any of said persons and that this court make all necessary orders as may be meet and proper in the premises.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH,
Executors and Petitioners.

PHILIP S. EHRLICH,
Attorney of Executors
and Petitioners.

State of California,
City and County of San Francisco—ss:

J. David Zellerbach and Harold L. Zellerbach,
being duly sworn, each for himself and not one for
the other, depose and say:

That he is one of the executors and petitioners in
the above entitled matter; that he has read the
within and foregoing petition and knows the con-
tents thereof; that the same is true of his own
knowledge, except as to the matters therein stated

on information and belief, and that as to those matters he believes it to be true.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH.

Subscribed and sworn to before me this 25th day of November, 1942.

[Seal] NEIL T. DUFFY,
Notary Public, in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Nov. 25, 1942.

EXHIBIT J

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

ORDER AND DECREE FOR PARTIAL DISTRIBUTION

J. David Zellerbach and Harold L. Zellerbach, executors of the Last Will and Testament of Isadore Zellerbach, deceased, having filed herein on the 25th day of November, 1942, their petition praying for an order and decree of partial distribution of this court, authorizing them to distribute from the assets of said estate the stocks hereinafter described

to the persons hereinafter named, and said petition coming on this day regularly to be heard, and proof having been made to the satisfaction of the court, the court finds that notice of the hearing of said petition has been regularly given for the period and in the manner and form required by law;

The Court, after hearing the evidence, finds that all the allegations of said petition are true; that the time for filing claims against said estate has expired; that all claims which [73] have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to the said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;

It is therefore ordered, adjudged and decreed that there be, and there is hereby distributed to the persons hereinafter named an aggregate of 6000 shares of the preferred capital stock of Crown Zellerbach Corporation; 30,000 shares of the common capital stock of Crown Zellerbach Corporation; 9000 shares of the preferred capital stock of Rayonier Incorporated, and 12,000 shares of the common capital stock of Rayonier Incorporated, which shares of

stock are distributed to said persons in the proportions set opposite their respective names, to wit:

One-half thereof to Jennie B. Zellerbach

One-sixth thereof to J. David Zellerbach

One-sixth thereof to Harold L. Zellerbach

One-sixth thereof to Claire Z. Saroni

It is hereby further ordered, adjudged and decreed that said J. David Zellerbach and Harold L. Zellerbach, the executors of the Last Will and Testament of Isadore Zellerbach, deceased, deliver to each of said persons certificates for the respective number of shares of said stock that each of said persons is entitled to receive.

It is hereby further ordered that the giving of any bond [74] by any of the persons herein named before receiving the respective distributions herein ordered be, and the same is hereby dispensed with.

Done in open Court this 8th day of December, 1942.

T. I. FITZPATRICK,

Judge of the Superior Court.

Consent to the foregoing partial distribution is hereby granted.

Dated November 28, 1942.

HARRY B. RILEY,

State Controller,

By A. W. BROUILLET,

Deputy Inheritance Tax
Collector.

[Endorsed]: Filed Dec. 8, 1942. [75]

EXHIBIT K

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

PETITION FOR AUTHORITY TO BORROW
MONEY AND PLEDGE PERSONAL
PROPERTY

To the Honorable, the Superior Court of the State
of California, in and for the City and County of
San Francisco:

The petition of J. David Zellerbach and Harold
L. Zellerbach respectfully show:

That your petitioners are the duly appointed,
qualified and acting executors of the Last Will and
Testament of Isadore Zellebach, deceased; that the
inventory and appraisement of said estate has been
duly made and filed herein; that as appears from
said inventory and appraisement the appraised
value of said estate is the sum of \$4,754,671.56; that
the petitioners hereby ask leave of court to borrow
money and to execute a note or notes and pledge on
the personal property of said estate, hereinafter
described, and the particular purpose or purposes
for which it is proposed to make said note or notes
and said pledge agreement are as follows: [76]

That it is necessary for your petitioners to raise
cash for the payment of inheritance taxes, estate
taxes and expenses of administration; that the
amount which your petitioners propose to raise is

\$1,000,000.00, payable on or before one year after date, with interest at the rate of $2\frac{1}{2}\%$ per annum, which note or notes are to be secured by a pledge of any or all of the personal property described in the inventory and appraisement on file herein and not heretofore sold or distributed to the heirs of decedent; that said pledge will be in such form as is required by the person or persons or lending institutions lending your petitioners said sum of money, or any portion thereof.

Wherefore, petitioners pray that an order be made and entered herein authorizing them, as executors of the Estate of Isadore Zellerbach, deceased, to borrow a sum not to exceed \$1,000,000.00 payable on or before one year after date with interest at the rate of $2\frac{1}{2}\%$ per annum, and to make and execute a promissory note or notes therefor, and as security for said promissory note or notes to pledge all or any portion of the personal property described in the inventory and appraisement on file herein and not heretofore sold or disposed of or distributed to the heirs of decedent, and for such purpose to execute a pledge agreement in such form or forms as may be required by the person or persons or lending institutions lending your petitioners said sum of money or any portion thereof, and that all other and proper orders be made in the premises.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH,
Petitioners.

PHILIP S. EHRLICH,
Attorney for Petitioners.

State of California,
City and County of San Francisco—ss.

J. David Zellerbach and Harold L. Zellerbach,
being duly sworn each for himself, and not one for
the other, depose and say:

That he is one of the petitioners in the above-
entitled matter; that he has read the within and
foregoing petition and knows the contents thereof;
that the same is true of his own knowledge, except
as to the matters therein stated on information and
belief, and that as to those matters he believes it to
be true.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH.

Subscribed and sworn to before me this 26th day
of October, 1942.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 26, 1942. [78]

EXHIBIT L

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

ORDER AUTHORIZING EXECUTORS TO
BORROW MONEY, EXECUTE PROMIS-
SORY NOTES, AND PLEDGE PERSONAL
PROPERTY

J. David Zellerbach and Harold L. Zellerbach, executors of the Last Will and Testament of Isadore Zellerbach, deceased, having filed herein on the 26th day of October, 1942, their verified petition for authority to borrow the sum of not to exceed \$1,000,000.00, payable on or before one year after date, with interest at the rate of $2\frac{1}{2}\%$ per annum, and to execute a promissory note or notes therefor, and as security for said promissory note or notes to pledge all or any portion of the personal property of said estate described in the inventory and appraisement on file herein and not heretofore sold or disposed of or distributed to the heirs of said decedent, said petition came on regularly this day to be heard before the above-entitled court, Department No. 9 thereof, and proof having been made to the satisfaction of the court, the court finds that notice of the time and place of the hearing of said petition

has been given in the manner and form and for the time required by law; and after hearing the evidence, the court being satisfied that it is for the best interests and advantage of said estate that said petition be granted;

Now, therefore, it is hereby ordered that said J. David Zellerbach and Harold L. Zellerbach, as executors of the Last Will and Testament of Isadore Zellerbach, deceased, be and they are hereby authorized to borrow a sum not to exceed \$1,000,000.00 and to execute their promissory note or notes therefor, payable on or before one year after date, with interest at the rate of $2\frac{1}{2}\%$ per annum, and as security for said promissory note or notes said executors are authorized to pledge all or any portion of the personal property of said estate described in the inventory and appraisal on file herein and not heretofore sold or disposed of or distributed to the heirs of decedent, and to execute a pledge agreement therefor, said promissory note or notes and pledge agreement to be in such form or forms as may be required by the person or persons or lending institutions lending said money, or any portion thereof.

Done in Open Court this 6th day of November, 1942.

Judge of the Superior Court.

[Endorsed]: Filed Nov. 6, 1942. [80]

EXHIBIT M

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

PETITION FOR PARTIAL DISTRIBUTION

To the Honorable, the Superior Court of the State
of California, in and for the City and County
of San Francisco:

The petition of J. David Zellerbach and Harold
L. Zellerbach respectfully shows:

1. That your petitioners are the duly appointed,
qualified and acting executors of the Last Will and
Testament of Isadore Zellerbach, deceased.

2. That said decedent died testate on August 7,
1941, and Letters Testamentary were issued to your
petitioners and to Marcus M. Baruh, now deceased,
on September 2, 1941; that more than four months
have elapsed since the issuance of such Letters
Testamentary.

3. That the total value of said estate, as shown
by the inventory and appraisement on file herein, is
\$4,754,671.56; that the time for filing claims against
said estate has expired; [81] that all claims which
have been filed have been allowed, approved and
paid; that the expenses of administration have not
been paid as yet, but there will be sufficient assets

with which to pay said expenses, even if the distribution herein prayed for and hereinafter described is allowed and paid.

4. That the federal estate tax, as disclosed by the return, has been paid; that the inheritance taxes due the State of California have not yet been determined; that the petitioners are informed and believe, and therefore allege that the State Controller will consent in writing to the partial distribution herein prayed for; that all personal property taxes due and payable by said estate have been paid.

5. That on September 2, 1942 an order and decree for partial distribution was made and entered herein under and by virtue of the terms of which all gifts and legacies under the terms of the Last Will and Testament of decedent were ordered to be paid; that pursuant to the terms of said decree all of said legacies have been paid.

6. That under the provisions of said Last Will and Testament of decedent it is provided as follows:

“I hereby give, devise and bequeath unto my dear wife, Jennie B. Zellerbach, an undivided three-sixths of all of the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, and I hereby give, devise and bequeath the remaining undivided three-sixths of said rest, residue and remainder of my estate to my three children, J. David, Harold L. and Claire, one-sixth to each.”

7. That included among the assets of said estate is a certain parcel of unimproved real property hereinafter described; that it is proposed to distribute the said parcel of real property at this time to the residuary legatees of said Last Will and Testament in the following proportions:

- (a) Three-sixths to Jennie B. Zellerbach
- (b) One-sixth to J. David Zellerbach
- (c) One-sixth to Harold L. Zellerbach
- (d) One-sixth to Claire Z. Saroni

That the following is a description of the real property proposed to be distributed by this petition:

All that real property situate, lying and being in the City and County of San Francisco, State of California, more particularly described as follows:

“Commencing at a point on the northerly line of Turk Street 137 feet 6 inches West of the Westerly line of Leavenworth Street, running thence westerly along the northerly line of Turk Street 137 feet 6 inches; thence at a right angle northerly 137 feet 6 inches; thence at a right angle easterly 137 feet 6 inches; thence at a right angle southerly 137 feet 6 inches to the northerly line of Turk Street and the point of commencement.”

Wherefore, petitioners pray that the clerk of the above-entitled court shall set this petition for hearing by the court; that notice of the time and place of such hearing shall be given in the manner and form required by law; that upon such hearing an order be made and entered herein distributing from the assets of said estate the real property herein de-

scribed to the persons herein named in the proportions above designated; that the court make an order dispensing with the execution and filing of a bond by any of said persons and that this court make all necessary orders as may be meet and proper in the premises.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH,
Executors and Petitioners.
PHILIP S. EHRLICH,
Attorney of Executors
and Petitioners.

State of California,
City and County of San Francisco—ss.

J. David Zellerbach and Harold L. Zellerbach, being duly sworn each for himself and not one for the other, depose and say:

That he is one of the executors and petitioners in the above-entitled matter; that he has read the within and foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH.

Subscribed and sworn to before me this 18th day of June, 1943.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 18, 1943. [84]

EXHIBIT N

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

ORDER AND DECREE FOR PARTIAL
DISTRIBUTION

J. David Zellerbach and Harold L. Zellerbach, executors of the Last Will and Testament of Isadore Zellerbach, deceased, having filed herein their petition praying for an order and decree of this court, on the 7th day of July, 1943, authorizing them to distribute the real property set forth in said petition, and hereinafter described, to the residuary legatees under the Last Will and Testament of Isadore Zellerbach, deceased, in the proportions that the residue of said estate is distributed to said residuary legatees; and said petition coming on regularly this day to be heard, and proof having been made to the satisfaction of this court, the court finds that notice of the hearing of said petition has been regularly given for the period and in the manner and form required by law;

The court after hearing the evidence finds that all [85] the allegations of said petition are true; that the time for filing claims against said estate has expired; that all claims which have been filed

have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed, as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;

It is therefore hereby ordered, adjudged and decreed that all of that certain real property hereinafter described, being a part of the residue and remainder of the Estate of Isadore Zellerbach, deceased, be, and the same is hereby distributed as follows:

- (a) Three-sixths to Jennie B. Zellerbach
- (b) One-sixth to J. David Zellerbach
- (c) One-sixth to Harold L. Zellerbach
- (d) One-sixth to Claire Z. Saroni

The following is a particular description of the real property of which distribution is hereby ordered:

All that certain real property situate, lying and being in the City and County of San Francisco, State of California, more particularly described as follows:

“Commencing at a point on the northerly line of Turk Street 137 feet 6 inches west of the

westerly line of Leavenworth Street, running thence westerly along the northerly line of Turk Street 137 feet 6 inches; thence at a right angle easterly 137 feet 6 inches; thence at a right angle southerly 137 feet 6 inches to the northerly line of Turk Street and the point of commencing.”

Done in Open Court this 7th day of July, 1943.

/s/ T. I. FITZPATRICK , ,

Judge of the Superior Court.

Consent to the foregoing partial distribution is hereby granted.

Dated June 22nd, 1943.

HARRY B. RILEY,

State Controller.

By A. W. BROUILLETT,

Deputy Inheritance Tax

Attorney.

[Endorsed]: Filed July 7, 1943. [87]

EXHIBIT O

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

PETITION FOR PARTIAL DISTRIBUTION

To the Honorable, the Superior Court of the State
of California, in and for the City and County
of San Francisco:

The petition of J. David Zellerbach and Harold
L. Zellerbach respectfully shows:

1. That your petitioners are the duly appointed,
qualified and acting executors of the Last Will and
Testament of Isadore Zellerbach, deceased.

2. That said decedent died testate on August 7,
1941, and Letters Testamentary were issued to your
petitioners and to Marcus M. Baruh, now deceased,
on September 2, 1941; that more than four months
have elapsed since the issuance of such Letters
Testamentary.

3. That the total value of said estate, as shown
by the inventory and appraisal on file herein, is
\$4,754,671.56; that the time for filing claims against
said estate has expired; that all claims which have
been filed have been allowed, approved and paid;
that the expenses of administration have not been
paid as yet, but there will be sufficient assets with

which to pay said expenses, even if the distribution herein prayed for and hereinafter described is allowed and paid.

4. That the federal estate tax, as disclosed by the return, has been paid; that the inheritance taxes due the State of California have not yet been determined; that the petitioners are informed and believe, and therefore allege that the State Controller will consent in writing to the partial distribution herein prayed for; that all personal property taxes due and payable by said estate have been paid.

5. That on September 2, 1942 an order and decree for partial distribution was made and entered herein under and by virtue of the terms of which all gifts and legacies under the terms of the Last Will and Testament of decedent were ordered to be paid; that pursuant to the terms of said decree all of said legacies have been paid.

6. That under the provisions of said Last Will and Testament of decedent it is provided as follows:

“I hereby give, devise and bequeath unto my dear wife, Jennie B. Zellerbach, an undivided three-sixths of all of the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, and I hereby give, devise and bequeath the remaining undivided three-sixths of said rest, residue and remainder of my estate to my three children, J. David, Harold L. and Claire, one-sixth to each.”

7. That included among the assets of said estate are six hundred and twenty-seven (627) shares of

the common capital stock of Dreamland Auditorium, Ltd. and four hundred and sixty (460) shares of the preferred capital stock of Dreamland Auditorium, Ltd.; that it is proposed to distribute said shares of stock at this time to the residuary legatees of the said Last Will and Testament in [89] the following proportions:

- (a) Three-sixths to Jennie B. Zellerbach
- (b) One-sixth to J. David Zellerbach
- (c) One-sixth to Harold L. Zellerbach
- (d) One-sixth to Claire Z. Saroni

Wherefore, petitioners pray that the clerk of the above-entitled court shall set this petition for hearing by the court; that notice of the time and place of such hearing shall be given in the manner and form required by law; that upon such hearing an order be made and entered herein distributing from the assets of said estate the property hereinabove described to the persons herein named in the proportions above designated; that the court make an order dispensing with the execution and filing of a bond by any of said persons and that this court make all necessary orders as may be meet and proper in the premises.

/s/ J. DAVID ZELLERBACH,
/s/ HAROLD L. ZELLERBACH,
Executors and Petitioners.

/s/ PHILIP S. EHRLICH,
Attorney for Executors and
Petitioners. [90]

State of California,

City and County of San Francisco—ss.

J. David Zellerbach, being first duly sworn, deposes and says:

That he is one of the executors of the Last Will and Testament of Isadore Zellerbach, deceased; and make this verification for and in behalf of the executors of said Last Will and Testament; that he has read the within and foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to it he believes them to be true.

/s/ J. DAVID ZELLERBACH.

Subscribed and sworn to before me this 4th day of August, 1943.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 4, 1943. [91]

EXHIBIT P

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of

ISADORE ZELLERBACH,

Deceased.

ORDER AND DECREE OF PARTIAL
DISTRIBUTION

J. David Zellerbach and Harold L. Zellerbach, executors of the Last Will and Testament of Isadore Zellerbach, deceased, having filed herein on the 4th day of August, 1943, their petition praying for an order and decree of this Court authorizing them to distribute the personal property hereinafter described to the residuary legatees under the Last Will and Testament of Isadore Zellerbach, deceased, in the proportions that the residue of said estate is distributed to said residuary legatees; and said petition coming on regularly this day to be heard, and proof having been made to the satisfaction of the Court, the Court finds that the notice of the hearing of said petition has been regularly given for the period and in the manner and form required by law;

The Court after hearing the evidence finds that all the allegations of said petition are true; that the time for filing claims against said estate has expired;

that all claims which have [92] been filed have been allowed, approved and paid; that the Federal Estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;

It is therefore hereby ordered, adjudged and decreed that the personal property hereinafter described being a part of the residue and remainder of the estate of Isadore Zellerbach, deceased be, and the same is hereby distributed as follows:

- (a) Three-sixths to Jennie B. Zellerbach
- (b) One-sixth to J. David Zellerbach
- (c) One-sixth to Harold L. Zellerbach
- (d) One-sixth to Claire Z. Saroni

The following is a particular description of the personal property of which distribution is hereby ordered:

- (a) 627 shares of the common capital stock of Dreamland Auditorium, Ltd.
- (b) 460 shares of the preferred capital stock of Dreamland Auditorium, Ltd.

Done in Open Court this 18th day of August,
1943.

FRANKLIN A. GRIFFIN,
Judge of the Superior Court.

Consent to the foregoing partial distribution is
hereby granted.

Dated August 9th, 1943.

HARRY B. RILEY,
State Controller.
By A. W. BROUILLET,
Deputy Inheritance
Tax Attorney.

[Endorsed]: Filed Aug. 18, 1943. [93]

EXHIBIT Q

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

PETITION FOR PARTIAL DISTRIBUTION

To the Honorable, the Superior Court of the State
of California, in and for the City and County
of San Francisco:

The petition of J. David Zellerbach and Harold
L. Zellerbach respectfully shows:

1. That your petitioners are the duly appointed,
qualified and acting executors of the Last Will and
Testament of Isadore Zellerbach, deceased.

2. That said decedent died testate on August 7, 1941, and Letters Testamentary were issued to your petitioners and to Marcus M. Baruh, now deceased, on September 2, 1941; that more than four months have elapsed since the issuance of such Letters Testamentary.

3. That the total value of said estate, as shown by the inventory and appraisement on file herein, is \$4,754,671.56; that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the expenses of administration have not been paid as yet, but there will be sufficient assets with which to pay said expenses, even if the distribution herein prayed for and hereinafter described is allowed and paid.

4. That the federal estate tax, as disclosed by the return has been paid; that all inheritance taxes due the state of California have been paid; that all personal property taxes due and payable by said estate have been paid.

5. That on September 2, 1942 an order and decree for partial distribution was made and entered herein under and by virtue of the terms of which all gifts and legacies under the terms of the Last Will and Testament of decedent were ordered to be paid; that pursuant to the terms of said decree all of said legacies have been paid.

6. That under the provisions of said Last Will and Testament of decedent it is provided as follows:

“I hereby give, devise and bequeath unto my dear wife, Jennie B. Zellerbach, an undivided

three-sixths of all of the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, and I hereby give, devise and bequeath the remaining undivided three-sixths of said rest, residue and remainder of my estate to my three children, J. David, Harold L. and Claire, one-sixth to each."

7. That it is estimated that the income from the estate of said decedent for the calendar year 1943 will approximate the sum of \$191,500.00; that the residuary legatees and the executors desire to distribute a portion of said income, to-wit, the sum of \$96,000.00 as follows:

| | | |
|-------------|--|--------------|
| (a) | To J. David Zellerbach, son of decedent..... | \$ 32,000.00 |
| (b) | To Harold L. Zellerbach, son of decedent.... | 32,000.00 |
| (c) | To Claire Z. Saroni, daughter of decedent.. | 32,000.00 |
| Total | | \$ 96,000.00 |

8. That it is not proposed at this time to distribute any of the corpus of the residue of the estate, nor any income, save and except that hereinabove described; that all of said income may be distributed without injury to the estate, or any person interested therein, and your petitioners request that the court dispense with the necessity of any of said legatees executing and filing a bond to your petitioners.

Wherefore, petitioners pray that the clerk of the above-entitled court shall set this petition for hearing by the court; that notice of the time and place of such hearing shall be given in the manner and form

required by law; that upon such hearing an order be made and entered herein distributing from the income of the estate of said decedent for the calendar year 1943, the sum of \$96,000.00 in cash, which income is to be distributed to the persons hereinabove named, in the amounts set opposite their respective names; that the court make an order dispensing with the execution and filing of a bond by any of said persons, and that this court make all necessary orders as may be meet and proper in the premises.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH,
Executors and Petitioners.

PHILIP S. EHRLICH,
Attorney for Executors
and Petitioners.

State of California,
City and County of San Francisco—ss.

J. David Zellerbach and Harold L. Zellerbach, being duly sworn each for himself and not one for the other, depose and say:

That he is one of the executors and petitioners in the above-entitled matter; that he has read the within and foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. DAVID ZELLERBACH,
HAROLD L. ZELLERBACH.

Subscribed and sworn to before me this 30th day of November, 1943.

THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Nov. 30, 1943. [97]

EXHIBIT R

In the Superior Court of the State of California in
and for the City and County of San Francisco

Dept. 9. No. 87721

In the Matter of the Estate of
ISADORE ZELLERBACH,

Deceased.

ORDER AND DECREE FOR PARTIAL DISTRIBUTION

J. David Zellerbach and Harold L. Zellerbach, executors of the Last Will and Testament of Isadore Zellerbach, deceased, having filed herein on the 30th day of November, 1943, their petition and praying for an order and decree of this court, authorizing them to distribute from the income of said estate, for the calendar year 1943, the sum of \$96,000.00 to the persons hereinafter named in the amounts set opposite their respective names, and said petition coming on this day regularly to be heard, and proof having been made to the satisfaction of the court, the court finds that notice of the

hearing of said petition has been regularly given for the period and in the manner and form required by law;

The Court, after hearing the evidence, finds that all the allegations of said petition are true; that the time for filing claims against said estate has expired; that all claims which [98] have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that all inheritance taxes due the State of California have been paid; that all personal property taxes due and payable by said estate have been paid; that that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration.

It is therefore hereby ordered, adjudged and decreed that said J. David Zellerbach and Harold L. Zellerbach, as executors of the Last Will and Testament of Isadore Zellerbach, deceased, pay and deliver to the persons hereinafter named from the income of said estate, for the calendar year 1943, the total sum of \$96,000.00 in the amounts set opposite their respective names, to-wit:

| | | |
|-----|--|--------------|
| (a) | To J. David Zellerbach, son of decedent..... | \$ 32,000.00 |
| (b) | To Harold L. Zellerbach, son of decedent.... | 32,000.00 |
| (c) | To Claire Z. Saroni, daughter of decedent.. | 32,000.00 |

\$ 96,000.00

It is hereby further ordered that the giving of any bond by any of the persons herein named before receiving their respective distributions of income be, and the same is hereby dispensed with.

Done in Open Court this 13th day of December, 1943.

T. I. FITZPATRICK,
Judge of the Superior Court.

[Endorsed]: Filed Dec. 13, 1943. [99]

EXHIBIT S

ESTATE OF ISADORE ZELLERBACH

Pro Forma Balance Sheet at December 31, 1942

After giving affect to unrealized appreciation of securities and liabilities unrecorded at that date but subsequently paid.

ASSETS

| | |
|-----------------------------------|-----------------|
| Cash | \$ 214,324.17 |
| Stocks—At Market Value..... | 3,077,943.20 |
| Bonds—do | 14,160.00 |
| Notes and Accounts Receivable.... | 62,760.45 |
| Real Estate—At Cost..... | 54,424.35 |
| Miscellaneous Assets..... | 1,480.00 |
| | <hr/> |
| Total Assets..... | \$ 3,425,092.17 |
| | <hr/> <hr/> |

LIABILITIES AND CORPUS

| | |
|---|-----------------|
| Income Taxes Payable..... | \$ 113,089.19 |
| Notes Payable to Bank—Secured | 500,000.00 |
| Notes and Claims Payable to Jennie Zellerbach..... | 318,669.31 |
| Mortgage Payable..... | 6,500.00 |
| Unrecorded Liabilities— Per Exhibit D..... | 552,306.99 |
| <hr/> | |
| Total Liabilities | \$ 1,490,565.49 |
| Estate Corpus and Undistributed Income | 1,934,526.68 |
| Balance Per Books— Exhibit B..... | \$ 2,252,973.47 |
| Unrealized Appreciation— Stocks | 230,715.20 |
| Unrealized Appreciation— Bonds | 3,145.00 |
| <hr/> | |
| Total | \$ 2,486,833.67 |
| Less unrecorded liabilities.... | 552,306.99 |
| <hr/> | |
| Total Liabilities and Corpus..... | \$ 3,425,092.17 |
| <hr/> <hr/> | |

ESTATE OF ISADORE ZELLERBACH

Balance Sheet at December 31, 1942

ASSETS

| | |
|---|-----------------|
| Cash in Banks and at Brokers.... | \$ 214,324.17 |
| Stocks—At Cost..... | 2,847,228.00 |
| (Estimated market value \$3,077,943.20) | |
| Bonds—At Cost..... | 11,015.00 |
| (Estimated market value \$14,160.00) | |
| Notes and Accounts Receivable.. | 62,760.45 |
| <hr/> | |
| Total Current Assets.... | \$ 3,135,327.62 |
| Real Estate..... | 54,424.35 |
| Miscellaneous Assets..... | 1,480.00 |
| <hr/> | |
| | \$ 3,191,231.97 |
| <hr/> <hr/> | |

LIABILITIES AND CORPUS

| | |
|---|-----------------|
| Income Taxes Payable..... | \$ 113,089.19 |
| Federal Tax on 1942 Income \$ 97,606.07 | |
| California Tax on 1942 in- | |
| come | 15,483.12 |
| <hr/> | |
| Note Payable—Wells Fargo | |
| Bank & Union Trust Co..... | 500,000.00 |
| (Due Nov. 6, 1943—secured | |
| by 9,000 shares Crown | |
| Zellerbach Corp., \$5.00 | |
| preferred.) | |
| Claim Payable—Jennie B. Zel- | |
| lerbach | 118,669.31 |
| <hr/> | |
| Total Current Liabilities | \$ 731,758.50 |
| Note Payable—Jennie B. Zeller- | |
| bach (Due May 6, 1945)..... | 200,000.00 |
| Mortgage Payable—Niantic | |
| Building | 6,500.00 |
| <hr/> | |
| Total Liabilities..... | \$ 938,258.50 |
| Estate Corpus at August 7, | |
| 1941—Assets at Ap- | |
| praised Values Less Lia- | |
| bilities—Per Exhibit B.... | \$ 3,335,942.29 |
| Undistributed Income for | |
| the Period From August | |
| 7, 1941, to December 31, | |
| 1941 | 46,632.64 |
| Undistributed Income for | |
| the Year Ended Decem- | |
| ber 31, 1942..... | 49,550.38 |
| <hr/> | |
| Total | \$ 3,432,125.31 |
| Deduct | 1,179,151.84 |
| Distribution to Legatees..... | \$ 1,104,000.00 |
| Specific Bequests Paid..... | 40,000.00 |
| Administrative Expenses | |
| Paid | 34,551.84 |

| | |
|---------------------------|-----------------|
| Miscellaneous Assets | |
| Distributed | 600.00 |
| Miscellaneous Assets Dis- | |
| tributed | 600.00 |
| | <hr/> |
| | \$ 3,191,231.97 |
| | <hr/> |

ESTATE OF ISADORE ZELLERBACH

Estate Corpus at August 7, 1941

ASSETS

| | | |
|-----------------------------|-----------------|-----------------|
| Cash in BaBnks..... | | \$ 210,318.53 |
| Total Balances..... | \$ 388,446.46 | |
| Less Property of Jennie B. | | |
| Zellerbach | 178,127.93 | |
| | <hr/> | |
| Stocks—Appraised Value..... | | 4,155,421.88 |
| Bonds—Appraised Value..... | | 121,280.00 |
| Notes and Loans—Appraised | | |
| Value | | 60,795.17 |
| Miscellaneous Assets..... | | 169,161.67 |
| Yacht—Janidore | \$ 157,500.00 | |
| Others | 11,661.67 | |
| Real Estate..... | | 55,500.00 |
| Accounts Receivable..... | | 10,178.87 |
| Accrued Interest..... | \$ 7,093.45 | |
| Accrued Salaries..... | 1,962.50 | |
| Accrued Dividends..... | 372.25 | |
| Accrued Rents..... | 750.67 | |
| | <hr/> | |
| Total Assets..... | | \$ 4,782,656.12 |
| Less Liabilities..... | | 1,446,713.83 |
| Federal Estate Tax..... | \$ 1,036,768.62 | |
| Claim of Jennie B. Zeller- | | |
| bach | 118,669.31 | |
| Debts of Decedent..... | 291,275.90 | |
| | <hr/> | |
| Estate Corpus at August 7, | | |
| 1941—To Exhibit A..... | | \$ 3,335,942.29 |
| | | <hr/> |

ESTATE OF ISADORE ZELLERBACH

Liabilities Not Recorded at December 31, 1942

| | |
|--|---------------|
| California Inheritance Taxes..... | \$ 287,488.53 |
| Assets Claimed by Jennie Zellerbach..... | 16,000.00 |
| Canadian Death Duties..... | 796.94 |
| Additional Assessment—California Tax—1940..... | 503.84 |
| Additional Assessment—California Tax—1941..... | 766.81 |
| Additional Assessment—California Tax—1941..... | 197.51 |
| Additional Assessment—California Tax—1940..... | 167.57 |
| Additional Assessment—Federal Tax—1940..... | 815.49 |
| Additional Assessment—Federal Estate Tax..... | 167,736.30 |
| Additional Assessment—Federal Estate Tax..... | * 41,450.67 |
| Additional Assessment—Federal Tax—1941..... | 421.16 |
| Additional Assessment—California Tax—1941..... | 85.45 |
| Attorney's fees | 35,876.72 |

Total unrecorded liabilities at December 31, 1942..\$ 552,306.99

*Determined in November, 1946; does not include interest.

EXHIBIT T

ESTATE OF ISADORE ZELLERBACH

Pro Forma Balance Sheet at December 31, 1943

After giving effect to unrealized appreciation of securities and liabilities unrecorded at that date but subsequently paid.

ASSETS

| | |
|---|-----------------|
| Cash | \$ 42,190.56 |
| Stocks—At Market Value..... | 3,741,673.90 |
| Bonds—At Market Value..... | 7,500.00 |
| Notes and Accounts Receivable..... | 52,238.51 |
| Claim for Refund of 1942 In- come Tax..... | 71,585.08 |
| Real Estate..... | 26,071.84 |
| Miscellaneous Assets..... | 1,480.00 |
| Total Assets..... | \$ 3,942,739.89 |

LIABILITIES AND CORPUS

| | |
|--|-----------------|
| Income Taxes Payable..... | \$ 7,422.68 |
| Note Payable to Bank—Secured | 525,000.00 |
| Notes and Claims Payable to Jennie Zellerbach..... | 318,669.31 |
| Mortgage Payable..... | 6,000.00 |
| Miscellaneous Liabilities..... | 277.03 |
| Unrecorded Liabilities..... | 247,517.68 |
| <hr/> | |
| Total Liabilities..... | \$ 1,104,886.70 |
| Estate Corpus and Undistributed Income | 2,837,853.19 |
| Balance Per Books— | |
| Exhibit B..... | \$ 2,148,697.37 |
| Unrealized Appreciation— | |
| Stocks | 936,673.50 |
| <hr/> | |
| Total | \$ 3,085,370.87 |
| Less Unrecorded Liabilities | 247,517.68 |
| <hr/> | |
| Total Liabilities and Corpus | \$ 3,942,739.89 |
| <hr/> <hr/> | |

ESTATE OF ISADORE ZELLERBACH

Balance Sheet at December 31, 1943

ASSETS

| | |
|--|-----------------|
| Cash in Bank..... | \$ 42,190.56 |
| Stocks—At Cost..... | 2,805,000.40 |
| (Estimated Market Value, \$3,741,673.90) | |
| Bonds—\$10,000.00 U. S. Series E—At Cost..... | 7,500.00 |
| Notes and Accounts Receivable.. | 52,238.51 |
| Claim for Refund of 1942 Income Tax..... | 71,585.08 |
| <hr/> | |
| Total Current Assets.... | \$ 2,978,514.55 |
| Real Estate..... | 26,071.84 |
| Miscellaneous Assets..... | 1,480.00 |
| <hr/> | |
| | \$ 3,006,066.39 |
| <hr/> <hr/> | |

LIABILITIES AND CORPUS

| | |
|---------------------------------|-----------------|
| Income Taxes Payable..... | \$ 7,422.68 |
| Federal Tax on 1943 Income | \$6,712.28 |
| California Tax on 1943 In- | |
| come | 710.40 |
| Notes Payable: Wells Fargo Bank | |
| & Union Trust Co..... | 525,000.00 |
| (Secured by 9,000 shares | |
| Crown Zellerbach Corp., | |
| \$5.00 Preferred.) | |
| Claim Payable — Jennie Zeller- | |
| bach | 118,669.31 |
| Miscellaneous Liabilities..... | 277.03 |
| | <hr/> |
| Total Current Liabili- | |
| ties | \$ 651,369.02 |
| Note Payable — Jennie Zeller- | |
| bach (Due May 6, 1945)..... | 200,000.00 |
| Mortgage Payable — Niantic | |
| Building | 6,000.00 |
| | <hr/> |
| Total Liabilities | \$ 857,369.02 |
| Estate Corpus — Per Exhibit C | 2,148,697.37 |
| | <hr/> |
| | \$ 3,006,006.39 |
| | <hr/> <hr/> |

ESTATE OF ISADORE ZELLERBACH
ANALYSIS OF ESTATE CORPUS

For the Year Ended December 31, 1943

| | | |
|--|---------------|-----------------|
| Balance — January 1, 1943..... | | \$ 2,252,973.47 |
| Add | | 230,509.20 |
| Undistributed Income for the Year | \$ 134,523.65 | |
| Adjustment of Liability of Taxes on 1943 Income as Claimed | 95,986.25 | |
| Total | | \$ 2,483,483.37 |
| Deduct | | 334,786.00 |
| California Inheritance Taxes.. | \$ 287,488.53 | |
| Partial Distribution of Assets | 29,800.00 | |
| Assets Claimed by Jennie Zel- lerbach | 16,000.00 | |
| Canadian Death Duties..... | 796.94 | |
| Additional California Tax on 1940 Income..... | 503.84 | |
| Miscellaneous Expenses | 196.69 | |
| Estate Corpus at December 31, 1943 — To Exhibit B..... | | \$ 2,148,697.37 |

The Tax Court of the United States

Docket No. 9786

ESTATE OF ISADORE ZELLERBACH, De-
ceased; J. DAVID ZELLERBACH and HAR-
OLD L. ZELLERBACH, Executors,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

San Francisco, California, December 6, 1946—2 p.m.
(Met pursuant to notice.)

Before: Honorable Ernest H. Van Fossan, Judge.

Appearances:

Albert A. Axelrod, Esq., and Philip S. Ehrlich,
Esq., 2002 Russ Building, San Francisco, Califor-
nia, appearing for Petitioners.

Edward J. Tonjes, Esq., (Honorable J. P. Wen-
chel, Chief Counsel, Bureau of Internal Revenue),
appearing for the Respondent. [109]

PROCEEDINGS

The Clerk: We have Docket 9786, Estate of Isa-
dore Zellerbach, Deceased; J. David Zellerbach and
Harold L. Zellerbach, Executors.

State your appearances, gentlemen, for the rec-
ord.

Mr. Axelrod: For the Petitioner, it is Philip S.
Ehrlich and Albert A. Axelrod. I am Axelrod.

Mr. Tonjes: Edward J. Tonjes for the Respondent.

The Court: Which one are you, please, sir?

Mr. Axelrod: Axelrod.

The Court: Will you state the issues?

Opening Statement on Behalf of the Petitioner
By Mr. Axelrod

Mr. Axelrod: May it please the Court, the Petitioner in this matter is the Estate of Isadore Zellerbach, Deceased. The taxes in controversy are income taxes for the calendar years 1942 and 1943. The decedent under his last Will and Testament made certain specific legacies and directed that the residue of his estate be distributed one-half to his widow, Jennie B. Zellerbach, and one-sixth to each of his children, to-wit, J. David Zellerbach, Harold L. Zellerbach and Claire Z. Saroni.

On September 2, 1942, the Probate Court made an order authorizing the Executors to make a partial distribution, which partial distribution directed the payment of all the [110] specific legacies under the Will. During the calendar year 1942 the total income of the estate for the year 1942 before any allowances for income distributed to beneficiaries for that year, was the sum of \$324,209.38, which was composed of ordinary income in the amount of \$316,595.74 and capital gains in the amount of \$7,613.64. These figures become important in the issues.

During the calendar year 1943 the total income of the estate for the year 1943 before any allowances for income distributed to beneficiaries for such

year, was the sum of \$206,864.94, which was composed of ordinary income in the amount of \$188,328.30 and capital gains in the amount of \$18,536.64.

Now, on November 25, 1942, the Executors filed two petitions for partial distribution with the Probate Court. In one petition they asked to distribute from the income of the estate the sum of \$181,000.00 to the residuary legatees, which amount they asked to be distributed as follows: To Jennie B. Zellerbach, widow, \$22,000, and to each of the children the sum of \$53,000. An order authorizing such distribution was made by the Probate Court on December 7, 1942, a copy of which is attached to the Stipulation of Facts as Exhibit H, which stipulation will be presented to the Court. On December 8, 1942, the Probate Court made another order for partial distribution—that is, the very next day—which [111] was based on the other petition which was filed on November 25, 1942, authorizing the Executors to distribute to the residuary legatees from the corpus of the estate in the proportions which they took under the will property which on said date had a fair market value of \$1,146,000. A copy of this order is likewise attached to the Stipulation of Facts and is marked Exhibit J therein.

The estate first claimed a credit in its income tax return for the year 1942 of the actual amount distributed by the order of December 7, 1942, to-wit, \$181,000, and each of the beneficiaries reported income in this amount. Subsequently the estate filed an amended return for the year 1942, in which it

claimed credit for the full amount of the income for the year 1942, to-wit, the sum of \$324,209.38, and Mrs. Jenne Zellerbach likewise filed an amended return wherein she included as income distributed to her one-half of the entire income of the estate of Isadore Zellerbach, deceased, for the year 1942, to-wit, the sum of \$157,661.87.

On November 30, 1943, the Executors filed a petition with the Probate Court for partial distribution, asking permission to distribute from the income of the estate for the year 1943 the sum of \$96,000.00, which sum was to be distributed one-third to each of the children of the decedent and no portion of the income was asked to be distributed to Jennie B. Zellerbach, the widow. [112]

On December 13, 1943, the court made an order for partial distribution authorizing the distribution of the amount of \$96,000.00, copy of which order is attached to the Stipulation of Facts as Exhibit R. Jennie B. Zellerbach reported in her income tax return for the year 1943 the fact that there had been distributed to her from the Estate of Isadore Zellerbach for the year 1943 the sum of \$92,664.15. The children reported the amount that was actually distributed to them.

Under the provisions of Section 162 of the Internal Revenue Code and Income Tax Regulation 111, Sec. 29.162-2, the estate claims as a credit against income tax for the year 1942 the full amount of its distributable income for said year, to-wit, the sum of \$324,209.38, and for the year 1943 the full amount of its distributable income for said

year, to-wit, the sum of \$206,864.94. The Commissioner has only allowed as a deduction the amount which was covered by the court's order, and has refused to allow the other amounts as a deduction.

It is the Petitioner's contention, based upon the record in this case, that this is a situation which is directly covered by Section 162 of the Internal Revenue Code and said Regulation 29.162-2, in that, as the record shows by the stipulation which will be offered here, that on December 31, 1942 the estate had assets of \$3,425,092.17; it [113] had liabilities of \$1,490,565.49, or it had an excess of assets over liabilities of \$1,934,526.68; that with respect to some of the liabilities, that these were secured; that the estate could have been distributed in December, 1942, which is evidenced by the fact that on December 8, 1942, corpus in excess of \$1,000,000 was distributed to the residuary legatess. Furthermore, since the amount of the corpus which was distributed in 1942 was in excess of the income, that under Section 162 of the Internal Revenue Code, to the extent to which the corpus exceeded the distributable income, that it will be deemed, first, a distribution of income, and the balance as a distribution of corpus.

With respect to the year 1943, the record shows a somewhat similar situation. On December 31, 1943, the assets of the estate were \$3,942,739.89; the liabilities were \$1,104,886.70, and the excess of the assets over the liabilities was \$2,837,853.19.

In view of these facts, all of which are covered by the Stipulation of Facts, and the additional

evidence which we will produce, we believe the Commissioner erred in not allowing as a deduction for the years 1942 and 1943 the full amount of the distributable income of the estate for each of said years, notwithstanding that the Executors did not obtain court orders authorizing the distribution of such income in its entirety. [114]

Now, we would like to——

The Court (Interposing): Just a moment.

Mr. Tonjes, do you wish to make a statement?

Mr. Tonjes: Very briefly, your Honor.

Opening Statement on Behalf of the Respondent
By Mr. Tonjes

Mr. Tonjes: The position of the Commissioner, of course, is that the amount which the estate may deduct is on the basis of the provision of the terms of the will, and if provisions of the applicable Revenue Act and Regulations limit it to the amount which was actually distributed, that the deductions are limited to that sum. The sums which were not distributed are part of the taxable income of the estate and were so treated by the Commissioner in his Notice of Deficiency.

There is a claim, your Honor, for a slight increased deficiency and I believe the facts which are stipulated support that, and that arises by reason of the fact that the parties agree that certain of the distributions making up the actual distribution were in part from corpus and not all income. Those items, or the amount of those sums, are set forth in the stipulation.

The Court: You may proceed.

Mr. Tonjes: There are some minor things, your Honor, I think, which may perhaps affect the pleadings at [115] this time, and desiring to raise a claim for an increased deficiency——

The Court (Interposing): Have you made it or are you about to make it?

Mr. Tonjes: I would like to request leave of the Court to file an amended answer which sets forth the Respondent's claim.

The Court: Is there objection?

Mr. Axelrod: No objection; it is covered by the stipulation.

The Court: The motion is granted.

Mr. Axelrod: We would also like to ask leave to file an amendment to our petition. I have handed to the Clerk such amendment; it merely sets forth two of the grounds on which we rely and which are set forth in the Stipulation of Facts. It is an addition of two——

The Court (Interposing): The petition will conform to the proof?

Mr. Axelrod: That is right, and neither one of the Executors are in San Francisco today, if it has to be verified. I think counsel will waive identification of the amendment.

Mr. Tonjes: If I have authority to do so, your Honor, I don't mind. Whether or not I can do that I am somewhat in doubt. [116].

Mr. Axelrod: If I may file it, I can bring one of the Executors over here Monday or Tuesday and have him verify it in court.

The Court: That may be well to do that.

Mr. Axelrod: May I file it at this time? It just covers two of the matters.

Mr. Tonjes: No objection to the filing of that, your Honor, and no doubt your Honor will want me to file a written brief to that, and I will in the next ten days or so.

Mr. Axelrod: It is covered by the Stipulation of Facts to the effect——

Mr. Tonjes (Interposing): That is true, but I think the record should be complete as to what my position is.

The Clerk: If your Honor please, I won't serve copies of this amendment on the parties until such time as it has been verified.

Mr. Axelrod: I have handed Mr. Tonjes a copy.

Mr. Tonjes: Then, in order to keep the record straight, might I have 30 days after filing or 10 days, some specified time after the service of that so that I can reply?

The Court: Do you need as much time as that?

Mr. Tonjes: I don't like to have the record show I am filing an answer before the amendment is served on me, you see. [117]

The Court: It will be served within the next 24 hours?

Mr. Axelrod: I think the only answer——

The Court (Interposing): He will make service as soon as it is verified?

Mr. Axelrod: Mr. Tonjes has the Stipulation of Facts which has been agreed upon, that that be filed at this time and considered in evidence.

Mr. Tonjes: Yes, the parties have stipulated to many of the facts in this case, Your Honor, and I file with the court an original and two copies and ask that the Clerk return one of them to me.

The Court: The stipulation will be received.

Mr. Axelrod: As I understand it, Mr. Tonjes is going to attach as exhibits C and D the copies of the income tax returns for the years involved and then he may substitute copies later.

Mr. Tonjes: Yes. I want to direct the Court's attention to the fact that the original income tax returns of the Estate of Isadore Zellerbach for the year 1942, being an original and an amended return, and the original return for the year 1943 are attached. The two returns for the year 1942 are marked Exhibit C and the return for the year 1943 being marked Exhibit D.

Might I have leave to withdraw those, your Honor, [118] and substitute photostatic copies?

The Court: You may do so.

Mr. Tonjes: That is all I have.

Mr. Axelrod: Judge Fitzpatrick?

Whereupon,

TIMOTHY I. FITZPATRICK

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, please.

The Witness: Timothy I. Fitzpatrick.

(Testimony of Timothy I. Fitzpatrick.)

Direct Examination

By Mr. Axelrod:

Q. It is Judge Fitzpatrick, is that right?

A. Yes.

Q. And you are one of the judges of the Superior Court of the State of California in and for the City and County of San Francisco?

A. I am.

Q. And you have been assigned to what is known as Department 9, which is the Probate Department of that court?

A. Yes.

Q. And as Judge of the Probate Department, you have in your jurisdiction the Estate of Isadore Zellerbach, Deceased? [119]

A. Yes.

Q. Are you familiar with that estate?

A. Well, more or less, yes. It has been in my department now, I guess, for about two years.

Q. I will call your attention to the fact that the record in this case shows that on November 25, 1942, there were two petitions filed in that estate, one of which asked for a partial distribution of income from that estate in the sum of \$181,000, which it was asked be distributed in the following amounts:

\$22,000 to Jennie B. Zellerbach, and \$53,000 to each of the children.

Then, on the same day, there was a petition filed for partial distribution of the corpus of the estate in an amount which has been stipulated here had a fair market value in excess of \$1,000,000; that on December 7, 1942 you signed an order authorizing

(Testimony of Timothy I. Fitzpatrick.)

the distribution of income in the amount of \$181,000, and the corpus as prayed for which had the value in excess of \$1,000,000.

I also call your attention to the fact that the petition recited, the petition for the distribution of income, recited that the income for this year, 1942, was approximately the amount of \$317,000. The orders show that the State Controller had consented to each of those distributions.

Now, I ask you, with those facts in mind, that if [120] the Executors or the heirs had presented a petition to you for the distribution of the entire income for the year 1942, would you have granted such a petition?

Mr. Tonjes: I object to the question, your Honor. Might I ask Mr. Counsel if this is being propounded, or this witness is being offered as an expert witness or something of that sort?

Mr. Axelrod: He is the Judge that has charge of this estate and who would sign these orders.

Mr. Tonjes: May I inquire, then, the purpose of the question?

Mr. Axelrod: The purpose is to show that we could have just as well as not have distributed the entire income for the year 1942 if we had so petitioned, and that therefore this is one of the cases that comes under the provisions of Section 162 of the Internal Revenue Code which we contend is what 162 was designed to accomplish.

Mr. Tonjes: I would like to state, then, your Honor, that the objection is renewed on the ground

(Testimony of Timothy I. Fitzpatrick.)

that it is immaterial, irrelevant; what might have been done, the fact remains that all of the petitions for distribution which are filed with the Court and acted upon by the Court, are made subject of stipulation and what might have been the result or what might not have been the result in the event that some further petitions were requested, or what not, might [121] have been made to the Court can't possibly have any bearing on what would constitute properly distributed income.

Certainly, it can't have any bearing on whether or not the income is distributable or not because that would depend entirely on the terms of the will, and for that reason Respondent objects to the witness testifying.

The Court: The objection will be overruled and I concede that the Petitioner has a right to present his theory of the case.

Mr. Tonjes: Very well, your Honor.

Q. (By Mr. Axelrod): Do you remember the question?

A. I am here as a witness, but in Probate Law, why, it wouldn't depend upon——

Mr. Tonjes (Interposing): Pardon me, your Honor. I think I will——

The Witness (Interposing): You made a statement it would depend on the terms of the will. It wouldn't at all unless there was something in the will that excludes you from doing it.

Mr. Tonjes: Just a moment. I have the right to object, and I think you should confine your an-

(Testimony of Timothy I. Fitzpatrick.)

swers to counsel's questioning, with all due respect to you.

The Witness: I know, but you made a statement——

Mr. Tonjes (Interposing): He can interrogate you [122] and perfect the record on that.

Mr. Axelrod: I have one further question I want to ask you, your Honor, which I didn't call to your Honor's attention in this matter.

Q. (By Mr. Axelrod): The record shows that all the specific legacies had previously been ordered distributed and that under the will, Jennie B. Zellerbach took one-half of the residue of the estate, each of the children had one-sixth of the residue. Now——

A. (Interposing): Had six months passed at that time with a notice to creditors a year after, which would be a very important element, and also others in the estate, whether the estate was solvent or insolvent depends upon partial distribution, or distribution.

Q. You are familiar with the estate, are you not?

A. Yes, I would say as familiar as I am with any large estate that is in my department.

Q. Well, the record also shows in this matter that the assets of the estate, the net assets over the liabilities, were in excess of \$1,000,000.

Now, with those facts in mind, would you have signed an order for the distribution of the entire income for the year 1942?

A. I surely would have. [123]

(Testimony of Timothy I. Fitzpatrick.)

Q. Now, I call your attention to the year 1943, and the record in this case, which shows that on November 30, 1943, the Executors filed a petition with the Court for a partial distribution of income in the sum of \$96,000, which they allege that the approximate income for the year 1943 was \$191,500, and that on December 13, 1943 you signed an order allowing a partial distribution of income in the amount of \$96,000, which amount was ordered be distributed one-third to each of the children.

Now, with the other facts as I have stated them, would you have, if the Petitioner had included a request to distribute the entire income of the estate for 1943, would you have granted such a petition?

A. I surely would.

Mr. Axelrod: No further questions.

Cross-Examination

By Mr. Tonjes:

Q. Would you base that entirely, Judge, on the representations contained in the petition?

A. I would base it on the condition that I knew the estate was in, which I would know from the record, and which I would know, as we say, after six months have passed, the time which creditors shall present their claims, and the assets of the estate; we always base distribution on that, to see there are sufficient assets left and it is not [124] impairing the corpus or the estate to any extent; the partial distribution could be made without impairing the interests of all those concerned, legatees,

(Testimony of Timothy I. Fitzpatrick.)

devisees, and others that would be interested in the estate. That is what you base your partial distribution on.

Q. Would you accept all the facts contained in the stipulation, or would you make an independent investigation to determine the value of some of these assets of the estate?

A. Well, of course, I would depend on what the appraisal was; I don't know whether the appraisal was made at that time or not, but I knew more or less about the Zellerbach Estate. It was in the mills, so I knew that. That is as far as any court can know. I didn't go in and make a great independent investigation at the time.

Q. Do you know whether or not the liability of the estate to pay Federal Income Taxes had been fully paid?

A. You say "had been fully paid"?

Q. Yes. A. No, I wouldn't know that.

Q. An estate of this size would be quite likely to run into a considerable liability for Federal Taxes, you would appreciate that, I guess.

A. I would appreciate it, surely. Of course, we always get a report from our Inheritance Tax Appraiser on these tax distributions, and I think in this case they had the consent, [125] did they not?

Mr. Axelrod: That is right; the record so shows.

The Witness: Yes, that is what I have to depend on.

Q. (By Mr. Tonjes): So if, as a matter of fact, an investigation conducted by you showed that there

(Testimony of Timothy I. Fitzpatrick.)

was a substantial liability for Federal Estate Taxes, it might alter your conclusion, would it not?

A. Well, if that showing had been made at the time, it might.

Q. Yes, and you would have to inquire into that, wouldn't you, Judge?

A. Well, if it was brought to my attention that there was to be a big Federal Inheritance Tax to be paid, and if I thought that the assets or the income of the estate would be impaired by granting a partial distribution, I would surely look into it, yes.

Q. So it would entail some exercise of judgment and discretion as to whether or not an order of that type would be granted, is that correct?

A. I think so.

Mr. Tonjes: I think that is all.

Redirect Examination

By Mr. Axelrod: [126]

Q. Before you grant these orders, you examine the Executors, don't you?

A. Yes, we have witnesses on the stand, of course, and they have to make a showing.

Q. And these matters are all investigated, I mean, before you sign such an order? You make such investigation at the time you signed the order granting the partial distribution?

Mr. Tonjes: I object to that; there is no question about the propriety of the distributions which were granted; counsel's question relates to whether or not he would grant some additional order of dis-

(Testimony of Timothy I. Fitzpatrick.)

tribution. I think his question should be confined to that proposition.

Mr. Axelrod: I just want to show that the Court just doesn't grant that matter; when he made the statement he would grant it, that he had investigated the situation of the estate.

Mr. Tonjes: I will stipulate that.

Q. (By Mr. Axelrod): I will also call your Honor's attention to the fact that the record in this case shows that the unrecorded liabilities, the total liabilities for the estate in 1942, which included the Federal and State tax, was \$1,490,565, and that the assets on the same date were \$3,425,092.

Now, with such a showing, would your testimony be [127] different? Would you still, under such a showing, would you have granted it?

A. Yes, I surely would.

Mr. Axelrod: That is all.

Mr. Tonjes: That is all.

The Court: Thank you, Judge.

(Witness excused.)

Mr. Axelrod: Mr. O'Connor.

Whereupon,

RICHARD C. O'CONNOR

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, Mr. Witness.

The Witness: Richard C. O'Connor.

(Testimony of Richard C. O'Connor.)

Direct Examination

By Mr. Axelrod:

Q. Mr. O'Connor, what is your capacity?

A. Deputy Inheritance Tax Attorney for the State of California.

Q. You are connected with the State Comptroller's office of the State of California, is that right?

A. That is right.

Q. And the State Comptroller's Office and your office has charge of the Inheritance Taxes for the State of [128] California, is that right?

A. That is true.

Q. Your particular office covers, as I understand, some 14 counties, including San Francisco and the——

A. ——adjacent counties.

Q. Yes, is that right, about 14 counties?

A. About 14, yes.

Q. And as such Deputy Inheritance Tax Attorney, you had under your jurisdiction in 1942 the Estate of Isadore Zellerbach, Deceased, is that right?

A. Yes.

Q. And you are more or less familiar with that estate, are you not?

A. Yes.

Q. I call your attention to the fact that the record in this case shows that on December 7, 1942, while the inheritance tax was not paid and determined as yet, a decree of partial distribution was made by the Probate Court consenting to the distribution of income from the estate in the sum of \$181,000, and that your office had consent to such

(Testimony of Richard C. O'Connor.)

partial distribution. The order, which is in evidence here, shows that it was signed by Mr. A. W. Brouillet; who is he?

A. He is the Deputy Inheritance Tax Attorney in San Francisco.

Q. He is the Deputy Inheritance Tax Attorney in charge [129] of your office, is that right?

A. Yes, he is the chief representative of the Comptroller in San Francisco.

Q. And the record in this case shows that he consented to the partial distribution on December 7th of \$181,000 in income; that is correct?

A. Yes.

Q. And this is a correct copy (showing same to witness)?

A. (Examining document): Yes.

Q. And I also call your attention to the fact that on December 8, 1942, the record in this case shows that an order and decree of partial distribution was made by the Probate Court consenting to the distribution of corpus of the estate which has been stipulated is in excess of \$1,000,000 in value, and that Mr. Brouillet on behalf of the State Comptroller consented to such distribution.

Now, with those facts in mind, if the request had been presented to your office for the distribution of the entire income of the estate, which was approximately \$320,000 for the year 1942, and with the fact that the inheritance taxes had not as yet been paid, would your office have consented to such distribution?

(Testimony of Richard C. O'Connor.)

Mr. Tonjes: That is objected to, your Honor, on the grounds it is irrelevant and immaterial. [130]

The Court: Objection overruled.

A. In what condition would that have left the estate, the net assets of the estate? Those distributions, approximately——

Q. (Interposing): The record shows that the net assets of the estate in '42 were in excess of \$1,000,000 over the liabilities.

A. Then without question such request would have been granted and the distribution prayed for would have been consented to.

Q. So in 1943 the inheritance taxes had already been paid so there would be no necessity for obtaining any consent; that is all.

Cross-Examination

By Mr. Tonjes:

Q. You base your conclusion, I gather, on the net worth of the estate?

A. That is right; our primary concern—our sole concern in granting or withholding consents to such partial distributions is based on the question whether the inheritance tax due sufficiently secured by assets remaining in the estate.

Q. And that requires the judgment and exercise of discretion, does it not?

A. I wouldn't say discretion; it is simply a matter of [131] mathematics.

Q. Matter of mathematics?

A. That is about all.

(Testimony of Richard C. O'Connor.)

Q. Could you figure out mathematically how low the estate would have to be before you would deny it under these circumstances?

A. Yes, we would have on file, certainly after a year or so from the date of the death, a report showing what the amount of inheritance tax due the State is. If we see that the amount remaining in the estate after this prayed for distribution is granted is far in excess of that amount, there is not much discretion involved; we just granted the request.

Q. Which is determined first: the Federal Estate tax or the State tax? A. Normally the State.

Q. The State? A. The California tax.

Q. Is there a tie-up or is the State tax determined in any way depending upon the Federal tax?

A. Yes, because one of the deductions allowable in the computation of the State inheritance tax is an amount represented by the Federal Estate tax.

Q. Do you know whether or not the Federal Estate tax had been determined when or at the date this question was [132] propounded to you?

A. I guess it was—when, 1942?

Mr. Axelrod: '42.

A. First in '42.

Q. (By Mr. Tonjes): Do you know whether or not the Federal Estate tax had been determined in 1942?

A. I believe a return had been filed, but that it had not been finally audited by the Federal authorities at that time.

(Testimony of Richard C. O'Connor.)

Mr. Tonjes: I think that is all.

Mr. Axelrod: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Axelrod: Mr. Eisenbach.

Whereupon,

JULIAN EISENBACH

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, Mr. Witness.

The Witness: Julian Eisenbach, E-i-s-e-n-b-a-c-h.

Direct Examination

By Mr. Axelrod:

Q. Mr. Eisenbach, you are an officer of the Wells [133] Fargo Bank and Union Trust Company, is that right? A. I am.

Q. What particular office do you hold?

A. Vice President.

Q. And as Vice-President, what are your particular functions?

A. Mainly in charge of credits.

Q. How long have you been connected with the Wells Fargo and Union Trust Company?

A. I am in my 49th year.

Q. And for a good portion of that time, have you been in charge of credits? A. Since 1916.

(Testimony of Julian Eisenbach.)

Q. 1916. Now, in 1942, as I understand it, the Wells Fargo Bank had made a loan to the Estate of Isadore Zellerbach, Deceased. A. Yes.

Q. Do you have the record in connection with that loan?

A. It is in that brief case there (indicating).

(Mr. Axelrod removed the record from the brief case and handed the same to the witness.)

Q. Would you please give us the details in connection with that loan?

A. (Examining document): On the 6th of November, 1942, the Executors of the Estate borrowed \$500,000; for collateral [134] they put up 9,000 shares of Crown Zellerbach Corporation preferred stock.

Mr. Axelrod: May I say it has been stipulated that that collateral had a value of approximately \$720,000?

Mr. Tonjes: That is contained in the stipulation.

Mr. Axelrod: He stipulated here that this collateral had a value of \$720,000 at that time.

Q. (By Mr. Axelrod): Now, when was the next entry, or what is the next entry you have in connection with that loan?

A. On the 15th of January, 1943 they paid \$100,000, reducing the principal to \$400,000.

On the 5th of August, 1943 they reduced it another—they borrowed \$50,000, increasing it to \$450,000.

On the 6th of December, 1943 they borrowed \$75,000 increasing the loan to a total of \$525,000.

(Testimony of Julian Eisenbach.)

and on the 13th of March, 1944 they paid it off entirely.

Q. Now, with that record in mind, if the Executors had requested the bank in 1942 to consent to a distribution of the estate, even though the loan was not paid, would the bank have consented to such a distribution?

A. Oh, as a matter of course.

Mr. Axelrod: That is all.

Cross-Examination

By Mr. Tonjes: [135]

Q. What was the——

Mr. Axelrod (Interposing): One more question. Would your answer be the same for 1943?

The Witness: All through the whole period of the loan.

Mr. Axelrod: That is all.

Q. (By Mr. Tonjes): That was because the collateral was pretty good? A. Yes.

Q. Suppose the collateral began to slip a little in value. What would you do?

A. We had so much of it I think the course would have been the same. The loan was very well secured from the very beginning.

Q. Would you say that loan—Strike that. What was the form of the note?

A. I haven't that here; I think it was a one-year note.

Q. It was a general obligation, wasn't it, so that if the collateral wasn't satisfactory, you could have recourse to the other assets of the estate?

(Testimony of Julian Eisenbach.)

A. We could ask for some more collateral, yes.

Q. It would depend, then, upon the stability and value of the Crown Zellerbach stock, as to whether or not that note would continue to be well secured, would it not?

A. Mainly, yes. [136]

Q. And if that Crown Zellerbach stock went down so low that it was not deemed to be good collateral, you would not renew the note, would you?

A. We might.

Q. Suppose the note went—the value of the Crown Zellerbach stock went so low that you sold it, you would then have to make recourse to the other assets of the estate, would you not?

Mr. Axelrod: I object to the question on the grounds it is assuming something not in evidence; there is no evidence here that the Crown Zellerbach Corporation stock had declined and it is assuming something not in evidence. The stipulation of facts shows that in December '42 the collateral was worth \$720,000, so it is assuming something not in evidence.

Mr. Tonjes: That is a strange objection coming from counsel for the Petitioner on the grounds that it is not supported by evidence in the record. This whole proposition of all of the oral evidence we have had introduced today is all on the assumption of something that might happen, and I think it is perfectly proper.

The Court: He may answer.

Q. (By Mr. Tonjes): What might happen, what courses might you take so as to find out—

(Testimony of Julian Eisenbach.)

Mr. Axelrod (Interposing): Speaking of approximately '42, and that is something that happened already in the past.

The Witness: You will have to ask the question again, please.

Q. (By Mr. Tonjes): If the stock of the Crown Zellerbach Company declined to such an extent that it no longer was good security for the face of the obligation, you would demand more security, would you not? A. Yes.

Q. And in the event that the note was not paid and the security had to be sold, you would then look to the other assets, would you not?

A. We might.

Q. Well, you would do all you could to get all of your obligation?

A. Yes, certainly, we would.

Q. And do you know what business the Crown Zellerbach Company was in?

A. Yes, certainly.

Q. What were they in?

A. The Crown Zellerbach Corporation is a holding company and an operating company, a very large enterprise.

Q. Do you know what the value of the stock was in 1942? [138]

A. Of this Crown Zellerbach preferred that we held?

Q. Yes.

A. According to our records, it was worth about a million dollars.

(Testimony of Julian Eisenbach.)

Q. I mean per share. A. \$97.50.

Q. You also appreciate that United States Steel sold as high as \$240 at one time? A. Yes.

Q. And you have seen it sell as low as \$75?

A. I don't remember, but it has taken a good drop.

Q. It could happen to Zellerbach?

A. It could happen to other good stock.

Mr. Tonjes: No further questions.

Redirect Examination

By Mr. Axelrod:

Q. In 1942, though, in December of 1942, you would have consented to the distribution of the estate as the accounts then stood, is that correct?

A. Yes.

Mr. Axelrod: That is all.

Mr. Tonjes: No further questions.

The Court: You are excused.

(Witness excused.)

If your Honor please, if it is agreeable with the Petitioner's case.

Mr. Tonjes: The Respondent has no further evidence, your Honor.

If your Honor please, if it agreeable with the Court, counsel and I have discussed the matter and it would be satisfactory or desirable on the part of both of us if you would grant the Petitioner the right to file an opening brief and I reply and he have a right to file a closing brief.

(Testimony of Julian Eisenbach.)

The Court: 45 days will be allowed for opening brief by the Petitioner and 45 days thereafter by Respondent for the reply, and 30 days thereafter for the Petitioner to reply to the Respondent's brief.

Mr. Axelrod: Thank you, your Honor.

Mr. Tonjes: That will be satisfactory, your Honor.

The Clerk: If you will bear with me, your Honor, I will borrow a 1947 calendar.

(The Clerk borrowed a 1947 calendar from T. M. Mather.)

The Clerk: January 21st for the original brief of the Petitioner.

Mr. Axelrod: That would be in Washington?

The Clerk: Yes; and if your Honor please, March 8th is on Saturday. Should I make it March 10th, 45 days thereafter? [140]

The Court: Give them March 10th.

The Clerk: The Respondent's brief on March 10th, and the reply brief by the Petitioner on April 10th, 1947.

The Court: That concludes the assignments for today?

The Clerk: That is correct, your Honor.

The Court: We will recess until tomorrow morning—until Monday morning.

(Whereupon, at 2:50 o'clock p.m., Friday, December 6, 1946, the hearing in the above-entitled matter was closed.)

Filed Jan. 6, 1947. [141]

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner admits and denies as follows:

5(e-1). Denies the allegations contained in subparagraph (e-1) of paragraph 5 of the amendment to petition.

5(e-2). Denies the allegations contained in subparagraph (e-2) of paragraph 5 of the amendment to petition.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel

T. M. MATHER,
E. A. TONJES,
Special Attorneys,

Bureau of Internal Revenue.

TMM:b 12/10/46

Received and Filed Dec. 30, 1946. [142]

Tax Court of the United States

9 T. C. No. 12

Docket No. 9786

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. DAVID ZELLERBACH and HAR-
OLD L. ZELLERBACH, Executors,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated July 22, 1947

FINDINGS OF FACT AND OPINION

Under the will of decedent, who died in August, 1941, after certain specific bequests, the residue was bequeathed and devised three-sixths to his widow and one-sixth to each of his three children. The will contained no direction as to the payment of the income of the estate during its administration. Under California law the entire estate was subject to the possession of the executors and to the control of the Probate Court for purposes of administration, sale and disposition as provided by law and chargeable with the expenses of administration and payment of debts. Upon petition of the executors and order of the Probate Court, the executors made partial distributions to the residuary beneficiaries out of 1942 and 1943 income and also corpus. There is no evidence as to what disposition was made of the undistributed 1942 and 1943 income or whether it was properly credited to the beneficiaries out of 1942 and 1943 income and also administration in 1942 and 1943. At the end of 1943

the estate assets had a value of \$3,942,739.89 and its liabilities amounted to \$1,104,886.70. Held, only the amounts actually distributed out of 1942 and 1943 income to the beneficiaries were allowable as a deduction in the respective years under section 162 (b), (c) or (d), Internal Revenue Code. [143]

Albert A. Axelrod, Esq., and Philip S. Ehrlich, Esq., for the petitioners.

Edward J. Tonjes, Esq., for the respondent.

The Commissioner determined deficiencies in income tax of \$1,171.72 and \$65,772.90 for 1942 and 1943. The question to be determined is whether the petitioners, for the purpose of determining taxable net income of the estate, are entitled to deduct, in addition to the income distributed to beneficiaries, all of the remaining income of each year although not distributed to beneficiaries or credited to them. In his amended answer the Commissioner makes claim for increased deficiencies in the amounts of \$1,768.55 for 1942 and \$67,425.17 for 1943.

Most of the facts were stipulated.

Findings of Fact

J. David Zellerbach and Harold L. Zellerbach are the duly appointed and acting executors of the last will and testament of Isadore Zellerbach, who died on August 7, 1941, a resident of the City and County of San Francisco, California. Income tax returns (Form 1041) for the years 1942 and 1943 were filed on the cash basis with the collector of internal revenue at San Francisco.

On September 2, 1941, the will of petitioners' decedent was admitted to probate by the Superior Court of California in and for the City and County

of San Francisco. Under the will, after bequests of \$5,000 to each of his eight grandchildren, all the rest, residue and remainder of testator's estate is given, devised and bequeathed as follows: An undivided three-sixths thereof to the widow, Jennie B. Zellerbach, and an [144] undivided one-sixth to each of the three children, J. David, Harold L. and Claire. The executors were given full, absolute and complete power and authority to sell, mortgage, pledge, exchange or otherwise dispose of or deal with the whole or any portion of the estate according to their judgment and discretion and without any court order. The will made no provision for the distribution of the income received by the estate during the period of administration.

Upon petition of the executors of the estate praying for leave to distribute the specific legacies an order of the Probate Court, dated September 2, 1942, was entered authorizing distribution of 61 shares of the preferred stock of Crown Zellerbach Corporation of a stated value of \$4,994.38 and the sum of \$5.62 in cash to each of the eight grandchildren of decedent.

On November 25, 1942, the executors filed with the Probate Court a petition for the distribution of \$181,000 from the income of the estate received during the year 1942, amounting to approximately \$317,000, as follows:

| | |
|-------------------------------------|------------------|
| To Jennie B. Zellerbach, widow..... | \$ 22,000 |
| To J. David Zellerbach, son..... | 53,000 |
| To Harold L. Zellerbach, son..... | 53,000 |
| To Claire Z. Saroni, daughter..... | 53,000 |
| Total | \$181,000 |

The petition stated in part that the total value of the estate as shown by the inventory and appraisal was \$4,754,671.56, and that "it is not proposed at this time to distribute any of the corpus of the residue of the estate, nor any income, save and except that hereinabove described." [145]

After hearing had, the Probate Court entered an order dated December 7, 1942, in which it found as follows:

* * * that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to the said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;
* * *

The order authorized payment "from the income of said estate, for the calendar year 1942, the total sum of \$181,000," payable \$22,000 to the widow and \$53,000 to each of the three children of decedent.

The above distribution of \$181,000 was paid \$180,297.85 out of income and \$702.15 out of corpus.

On November 25, 1942, the executors filed another petition with the Probate Court praying for authority to distribute from the corpus of the estate:

6,000 shares of preferred stock of Crown Zellerbach Corporation;

30,000 shares of common stock of Crown Zellerbach Corporation;

9,000 shares of preferred stock of Rayonier Incorporated;

12,000 shares of common stock of Rayonier Incorporated;

one-half thereof to the widow and one-sixth to each of the three children of decedent. After hearing had, the Probate Court entered an order dated December 8, 1942, authorizing the executors to make distribution of the above stock as prayed for. The fair market value of the above stock at the time of its distribution was \$1,146,000. [146]

On December 31, 1942, all the distributions authorized by the Probate Court during the year 1942 had been made.

An original income tax return for the year 1942 was filed for the estate showing income of \$322,756.33, from which is deducted \$181,000 as the amount distributable to beneficiaries, leaving a net income (taxable to fiduciary) of \$141,756.33, and disclosing a tax liability of \$97,606.47. On December 14, 1943, an amended income tax return was filed for the year 1942 showing income of \$322,756.33, from which is deducted \$315,323.74 as the amount distributable to beneficiaries, leaving a net income (taxable to fiduciary) of \$7,432.59 and disclosing a tax liability of \$1,619.78.

The total net income of the estate for 1942, before any allowance for income distributed to beneficiaries during the year was \$324,209.38, which sum is composed of ordinary income in the amount of \$316,595.74 and capital gains in the amount of \$7,613.64.

The \$181,000 distributed in 1942 by the executors of the estate was reported by the beneficiaries under the will in their original Federal income tax returns for 1942 as distributable income from the estate as follows: The widow reported \$22,000 and each of the three children reported \$53,000.

On January 24, 1944, the widow filed an amended income tax return with the collector at San Francisco, in which she reported as having been distributed to her the amount of \$157,661.87, representing one-half of all of the income of the estate for the year 1942.

Pursuant to a petition of the executors filed June 18, 1943, the Probate Court, on July 7, 1943, made an order authorizing the executors [147] to make a partial distribution of the assets of the estate consisting of a parcel of unimproved real property in the City and County of San Francisco as follows: Three-sixths thereof to the widow and one-sixth thereof to each of the three children. The fair market value of the property at the time of distribution was \$27,500.

Pursuant to a petition of the executors filed August 4, 1943, the Probate Court on August 18, 1943, made an order authorizing the executors to make a partial distribution of the assets of the

estate consisting of 627 shares of the common stock and 460 shares of the preferred stock of Dreamland Auditorium, Ltd., as follows: Three-sixths thereof to the widow and one-sixth thereof to each of the three children. The fair market value of the shares at the time of distribution was \$3,450.

On November 30, 1943, the executors filed a petition with the Probate Court for authorization to make a partial distribution consisting of \$96,000, of which \$32,000 was to be distributed to each of the three children of decedent. In the petition it was stated that the income for 1943 would approximate \$191,500; that the executors desired to distribute \$96,000 thereof; and that it was not proposed to distribute any of the corpus of the residue of the estate, nor any income save and except that theretoabove described. No portion of the income was requested to be distributed to the widow. On December 13, 1943, the Probate Court made an order authorizing the income distribution of \$96,000, as prayed for. The distribution of \$96,000 was paid \$94,164.15 out of income and \$1,835.85 out of corpus. [148]

On December 31, 1943, all distributions authorized by the Probate Court during 1943 had been made.

The income tax return filed for the estate for 1943 shows income tax income of \$203,895.74 and victory tax income of \$200,811.46, from each of which \$185,328.30 was deducted as the amount distributable to beneficiaries, leaving an income tax net income of \$18,567.44 and a victory tax net in-

come of \$15,483.16. The total income and victory tax liability shown by the return is \$6,712.28. The return contains a schedule as follows:

| SCHEDULE A | | |
|--|--------------|--------------|
| | Federal | State |
| Jennie B. Zellerbach, 343 Sansome St., S. F..... | \$ 92,664.15 | \$100,405.73 |
| J. D. Zellerbach, 343 Sansome St., S. F. | 30,888.05 | 33,468.58 |
| Harold Zellerbach, 343 Sansome St., S. F. | 30,888.05 | 33,468.58 |
| Claire Z. Saroni, 343 Sansome St., S. F. | 30,888.05 | 33,468.58 |
| | <hr/> | <hr/> |
| | \$185,328.30 | \$200,811.46 |

Note: On December 13, 1943, a distribution of income, \$96,000.00 was authorized by court order to J. D. and Harold Zellerbach and Claire Saroni. The net income of the estate is deemed to be distributable under Section 162-2 of Regulation III.

The widow included in her Federal income tax return for 1943, as income received by her from the estate, the sum of \$92,664.15.

The total net income of the estate for 1943, before any allowance for income distributed to beneficiaries during that year, was \$206,864.94, which sum was composed of ordinary income of \$188,328.30 and capital gain of \$18,536.64.

On petition filed October 26, 1942, the Probate Court, on November 6, 1942, made an order authorizing the executors to borrow a sum not to exceed \$1,000,000, to execute their promissory note or notes payable on or before [149] one year after date with

interest at $2\frac{1}{2}$ per cent per annum, and as security therefor to pledge all or any portion of the personal property of the estate remaining in the hands of the executors.

Pursuant to such authorization the executors, on November 6, 1942, borrowed from Wells Fargo Bank & Trust Co. the sum of \$500,000, pledging as collateral 9,000 shares of the preferred stock of Crown Zellerbach Corporation of the market value at that time of approximately \$720,000. They also borrowed the sum of \$318,669.31 from the widow, Jennie B. Zellerbach. On January 15, 1943, a payment of \$100,000 was made, reducing the principal of the bank loan to \$400,000. On August 5, 1943, and on December 6, 1943, additional amounts of \$50,000 and \$75,000 were borrowed, increasing the principal of the loan to \$525,000. The entire loan was paid on March 13, 1944.

The Federal estate tax, as disclosed by the return filed, had been paid at December 31, 1943. The Commissioner subsequently determined that the estate was liable for a deficiency in Federal estate taxes, which controversy was finally settled in November, 1946.

On December 31, 1942, the estate had assets of the then value of \$3,425,092.17 and liabilities of \$1,490,565.49, or an excess of assets over liabilities of \$1,934,526.68. This was after the distribution of the amount of \$181,000 and the distribution of corpus of \$1,146,000, and after giving effect to all liabilities which were subsequently determined to be due.

On December 31, 1943, the assets of the estate had a value of \$3,942,739.89, and the liabilities amounted to \$1,104,886.70, or an excess of assets over liabilities of \$2,837,853.19. [150]

Opinion

Van Fossan, Judge: The respondent contends that the executors under the will of Isadore Zellerbach were not required to distribute to the beneficiaries any of the income of the estate during 1942 and 1943 and that, therefore, only so much of the income as was actually distributed constituted a deduction under the provisions of section 162, Internal Revenue Code.

The petitioners contend that the estate is entitled, under section 162 (b) and (c)¹, to a deduction of

¹Sec. 162. Net Income

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that * * *

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this

the full amount of its 1942 and 1943 income. They argue that the will provides for the distribution of three-sixths of the residue to the widow and one-sixth to each of the three children of decedent; that under the provisions of section 300 of the California Probate Code² the beneficiaries had a present right, both in 1942 and 1943 to the entire

section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary. [151]

²§300. Title to Decedent's Estate: Possession. When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or his administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this Code [Enacted 1931.]

income of the estate; and that, upon petition, it would have been mandatory upon the Probate Court to have made an order for the payment of all of the 1942 and 1943 income to the beneficiaries. Sections 956, 1000 and 1001 of the California Probate Code.³

³§956. Closing Administration. If all of the debts have been paid by the first order for payment, the court must direct the payment of legacies and the distribution of the estate among the persons entitled, as provided in the next chapter; but if there are debts remaining unpaid, or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for such time as may be reasonable. [Enacted 1931.]

§1000. Petition and Notice of Hearing. At any time after the lapse of four months from the issuance of letters testamentary or of administration, the executor or administrator, or any heir, devisee or legatee, * * * may petition the court to distribute a legacy, devise or share of the estate, or any portion thereof, to any person entitled thereto, upon such person giving a bond as hereinafter provided. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. When the petitioner is not the executor or administrator, notice must be given to the executor or administrator by citation. An executor or administrator, not petitioning, or any person interested in the estate may resist the application.

§1001. Order for Distribution: Prerequisites to Order: Bond. If, at the hearing, it appears that the estate is but little indebted and that all inheritance taxes payable in said proceedings have been paid, or that the State controller, an inheritance tax attorney, or an assistant inheritance tax attorney has in writing consented to said distribution

Although section 300 of the California Probate Code provides that title to the property of a deceased person passes to his heirs, devisees or legatees, it also provides that the title so passes "subject to the possession of the executor or his administrator and to the control of the superior court for the purpose of administration, sale or other disposition" and "shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family." See *Dabney v. Dabney*, 129 Pac. (2d) 470. In the *Estate of B. Brasley Cohen*, 8 T. C. — (April 8, 1947) involving a California estate, the question considered was whether the legatees had a present right under California law to obtain or compel a distribution of all of the income during the taxable year. This Court concluded that the legatees did not have "a recognized present right under local

and the legacy, devise or share of the estate, or any portion thereof, may [152] be distributed to the person entitled thereto without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver the legacy, devise or share of the estate or such portion thereof as the court may designate, to the person entitled thereto, upon receiving from such person a bond executed by him, and payable to the executor or administrator in such sum as the court may designate, with sureties to be approved by the judge, and conditioned for the payment, whenever required, of the proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate, so ordered to be delivered. * * * [153]

law to obtain income or compel a distribution of income'', (Regulations 111, section 29.162-2(b)), stating:

The legatees did have the privilege of petitioning the court, which they did not exercise, and if they had established certain facts the local court could have, in its discretion, ordered a distribution of the designated portion of the estate. We think the privilege of soliciting the local court's discretion is not the equivalent of a present right to compel distribution.

The will involved herein contains no direction for the payment of the [153] income received during the administration of the estate to the residuary beneficiaries. Petitions were filed with the court for a distribution of the 1942 income to the extent of \$181,000 and of the 1943 income to the extent of \$96,000. No other petition for the distribution of income was addressed to the court either by petitioners or any of the beneficiaries under the will and no further distribution of 1942 and 1943 income was authorized. The possession and handling of the property of an estate by the executor are subject to the control of the court and the executor derives his power to act from the order of the court. In *Re Palm's Estate*, 156 Pac. (2d) 62, 66; Section 300, California Probate Code. The testimony of the judge of the Superior Court of San Francisco County, in which court the will involved herein was admitted to probate, to the effect that, had petition been made therefor, he would have issued an order in 1942 and 1943 for

the distribution of all the income received by the estate during such years, is not determinative. Neither is it material that the bank to which the estate was indebted on a \$500,000 loan, or the inheritance tax attorney, would have consented to such distribution had petition been made therefor. The facts as they actually existed during the taxable year are determinative. *American Potash & Chemical Co.*, 7 T. C. 1113, 1116.

The facts herein are materially different from those in *William C. Chick*, 7 T. C. 1414. In that case the will of decedent was allowed for probate in March, 1929. William C. Chick, the son of decedent, who was named both as executor and trustee under the will, immediately qualified as executor and shortly thereafter qualified as trustee. All acts necessary [154] to complete and wind up the administration of the estate of decedent had been fully performed prior to the taxable year 1940, except that the assets comprising the residuary estate had not been transferred by the executor to himself in trust for the benefit of himself and his sister, as provided under the will. Under the terms of the testamentary trust the net income of the residuary trust was currently distributable in equal shares to the two beneficiaries. This Court approved the determination of the Commissioner that the estate in 1940 was no longer in process of administration and that the income of the estate was taxable to the two beneficiaries of the residuary trust under section 162 (b).

Herein decedent died in August, 1941. The assets of the estate had an appraised value in excess of \$4,700,000. At the end of 1943 there were liabilities outstanding in excess of \$1,100,000. Although the Federal estate tax as disclosed by the return had been paid, the Commission subsequently determined that the estate was liable for a deficiency, which controversy was not settled until November, 1946. There is no showing that the process of administration had been continued unreasonably or that the ordinary duties pertaining to the administration and settlement of the estate had been completed prior to the taxable years. Section 29.162-1(c) of Regulations 111.

It is true that in the case of *In Re Stephenson's Estate*, 150 Pac. (2d) 222, upon which petitioners primarily rely, it is stated that "It is made mandatory by section 1001 that the court make the order of distribution." The court, however, immediately modifies that statement for it continues as follows: [155]

* * * for it is there provided that if it appears that the estate is but little indebted and that inheritance taxes have been paid and that the distribution of the portion of the estate may be made without loss to creditors or injury to others 'the court shall make an order' for the delivery of the share of the estate or such portion thereof as the court may designate to the person entitled thereto. * * *

the Probate Code clearly gives power to the court to order a partial distribution of an

estate and, given the prescribed conditions, it is made mandatory upon the court to make the order. But to exercise that power accurately it is necessary that it first be determined what persons are entitled to the order and what portion or portions of the estate should be distributed to them. * * *

The court thus recognizes that the mandate is subject to certain conditions so that in the last analysis the order of distribution is subject to the judgment and discretion of the Probate Court.

The beneficiaries had no present right to the 1942 and 1943 income. They merely had a potential right thereto, which, as to the amount in dispute, was neither recognized nor enforced. The 1942 and 1943 income of the estate was not income of the estate "to be distributed currently" as provided in section 162 (b). *Estate of Andrew J. Igoe*, 6 T. C. 639.

Neither is the estate entitled to any deduction for 1942 and 1943 under section 162 (c) in addition to the amounts actually distributed out of income. There is no evidence that the undistributed 1942 and 1943 income was properly credited to any of the beneficiaries as required by the statute. *Commissioner v. Stearns*, 65 Fed. (2d) 371, certiorari denied, 290 U. S. 670.

The facts and circumstances in *Estate of Andrew J. Igoe*, *supra*, are wholly different from the facts and circumstances herein. In that case specific credits of the distributive share of income were made to the [156] account of each beneficiary. They

were notified of their respective distributive shares; they received numerous large payments in cash, which were charged to their accounts with the estate, and the actions of the executors in so treating the income earned by the estate were approved in all respects by the court having jurisdiction over the settlement of their accounts. Herein the residuary beneficiaries may never have received the 1942 and 1943 income retained by the executors. There is no evidence showing what disposition was made of such income by petitioners.

The petitioners further contend that, having distributed property of the value of \$1,146,000 in addition to the distribution of \$181,000 in 1942, the estate is entitled to a deduction of the entire income in 1942, and, having distributed property of the value of \$30,950 in addition to the distribution of \$96,000 in 1943, the estate is entitled to a deduction in 1943 to the extent of \$126,950 under section 162 (d) (1), Internal Revenue Code.⁴

⁴Sec. 162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that
* * *

(d) Rules for Application of Subsection (b) and (c).—For the purposes of subsections (b) and (c)—

(1) Amounts Distributable Out of Income or Corpus.—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distrib-

The respondent argues that there is no occasion for the application of section 162 (d) since the amounts of income and corpus distributed by the estate are clearly identifiable and that the orders of the Probate Court are binding in this respect.

Subsection (d) (1) is made specifically not applicable to any amount paid, credited, or to be distributed "under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals." The bequest and devise under which the distributions of income and corpus herein were made was a bequest and devise of the residue of the estate of decedent after payment of all debts,

uted at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the [157] distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable years of the estate or trust. * * * [157]

specific legacies and administration expenses. That the residue was paid in installments, consisting of income or corpus, is immaterial and does not convert the bequest and devise into one distributable at intervals within the meaning of section 162 (d) (1).

Subsection (d) was added to section 162 by section 111 (c) of the Revenue Act of 1942 as a complement to the amendment of section 22 (b) (3) and for purposes of clarity. Ways and Means Committee Report No. 2333, 77th Congress, Second Session, Section 110, pp. 66-68; Report of the [158] Committee on Finance, No. 1631, 77th Congress, 2nd Session, Section 111, pp. 69-75. Section 110 of the Ways and Means Committee Report is captioned "Annuity Trusts". The section states that the construction of the existing law, as contained in *Irwin v. Gavit*, 26 U. S. 161, was written into the amendment of section 22 (b) (3) and that both the amendment to section 22 (b) (3) and section 162 changed the treatment of gifts, bequests, devises and inheritances of amounts to be paid in any event out of income or corpus, such as involved in *Burnet v. Whitehouse*, 283 U. S. 148; and *Helvering v. Pardee*, 290 U. S. 365. The Committee's report states that such changes involved

* * * treating such amounts, if under the terms of the gift, bequest, or inheritance the payment, crediting, or distribution thereof is to be made at intervals, as gifts, bequests, devises, or inheritances if income from property to the extent that such amount is paid, credited,

or to be distributed out of income from property. * * * (p. 67)

As a complement to the amendment of section 22(b) (3) and for purposes of clarity, section 162 of the Code is also amended by adding a new subsection designated as “(d)”. This subsection provides a formula for allocating income of an estate or trust to legatees and beneficiaries in order to make the source of distribution clear and to prevent tax avoidance by distributions claimed to be other than out of income or out of income other than income for the current taxable year. It is immaterial under the rule stated in section 162 (d) whether income is used to make the distribution, whether such distribution may, in the discretion of the fiduciary, be made out of other than income, or whether the terms of the will or trust instrument direct that amounts other than income be used to assure the beneficiary the payment of a specified sum at stated intervals. * * * (p. 68)

In Section 111 of the Report of the Committee on Finance, page 69, it is stated: [159]

This section is basically the same as section 110 of the bill passed by the House, relating to annuity trusts. Although numerous changes have been made by your committee, such changes are designed to give further and more detailed application of the principles of section 110 of the House bill rather than to change its fundamental theory.

See also section 29.162-2 of Regulations 111, dealing with section 162 (d) (1), which is entitled "allocation of Estate and Trust Income to Legatees and Beneficiaries. — (a) Allocation among annuitants." From the foregoing, it is obvious that amounts paid out of corpus on a bequest and devise as herein involved are not within the purpose and scope of subsection (d).

Since the bequest and devise of the residuary estate herein is a bequest and devise "not to be paid, credited, or distributed at intervals," subsection (d) of section 162 is not applicable.

Petitioners are entitled only to the deduction in 1942 and 1943 of the amount actually distributed out of income under section 162 (c). In view of our holding, the respondent is entitled to increased deficiencies. Under the stipulated facts, petitioners distributed out of income \$180,297.85 in 1942 and \$94,164.15 in 1943, instead of \$181,000 and \$96,000, respectively, allowed by respondent in his original computation.

Decision will be entered under Rule 50.

[Seal] [160]

[Title of Tax Court and Cause.]

NOTICE UNDER RULE 50

To: Phillip S. Ehrlich, Esq., 2002 Russ Bldg., San Francisco 4, Calif.

Take notice that the Respondent in the above-entitled proceeding filed with the Court on Aug. 22, 1947, a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 9:30 a.m. on Sept. 17, 1947, before a Division of the Court at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquiescence to the entry of a decision based on such computation shall have been filed with the Court.

No further notice of said hearing will be sent.

/s/ ROBERT C. TRACY,
Acting Clerk.

[Title of Tax Court and Cause.]

COMPUTATION FOR ENTRY OF
DECISION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and submits the attached computation of the deficiency under the opinion of The Tax Court of the United States promulgated July 22, 1947, in the above-entitled appeal.

The respondent's computation is submitted in accordance with Rule 50 of the Tax Court's Rules of Practice and is without prejudice to his right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

/s/ CHARLES OLIPHANT,

W. J. McF.

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

WJMcF:b 8/14/47

AUDIT STATEMENT

C:TS:PD

SF:EAT:ENN:Recomp.

In re: Estate of Isadore Zellerbach, Deceased,
 J. David Zellerbach and Harold L. Zellerbach,
 Executors, 343 Sansome Street, San Francisco,
 California.

Docket No. 9786

Tax Liability for the Taxable years ended De-
 cember 31, 1942, and December 31, 1943.

INCOME TAX

| Year | Liability | Assessed | Deficiency |
|-------------|--------------|--------------|--------------|
| 1942 | \$ 99,375.02 | \$ 97,606.47 | \$ 1,768.55 |
| 1943 | 74,100.74 | 6,712.28 | 67,388.46 |
| Total | \$173,475.76 | \$104,318.75 | \$ 69,157.01 |

Recomputation of tax liability prepared in accor-
 dance with the Opinion of The Tax Court of the
 United States promulgated July 22, 1947.

YEAR: 1942

Schedule 1

ADJUSTMENT TO NET INCOME

| | |
|--|--------------|
| Net Income as Disclosed in the Deficiency Notice dated September 20, 1945..... | \$143,209.38 |
| As Adjusted, Based on the Opinion of the Tax Court of the United States Promulgated July 22, 1947, and Stipulation of Facts Between the Parties..... | 143,911.51 |
| Adjusted (Increase) | \$ 702.15 |

Schedule 2

EXPLANATION OF ADJUSTMENT

Net income is increased \$702.15, as a result of the opinion of The Tax Court of the United States holding that petitioner is entitled to a deduction of \$180,297.85, the amount actually distributed out of income to beneficiaries of the estate, in lieu of a deduction of \$181,000.00 as allowed in the deficiency notice.

Schedule 3

COMPUTATION OF TAX

| | |
|--|--------------|
| Net Income, Schedule I..... | \$143,911.53 |
| Less: Personal Exemption..... | 500.00 |
| Surtax Net Income..... | \$141,411.53 |
| Normal Tax Net Income..... | \$143,411.53 |
| Normal Tax at 6% on \$143,411.53..... | \$ 8,604.69 |
| Surtax on \$143,411.53..... | 93,435.11 |
| Total Tax | \$102,039.80 |
| Alternative Tax, Schedule 4..... | \$ 99,375.02 |
| Income Tax Liability..... | \$ 99,375.02 |
| Tax Assessed, Account No. 1209423, 1st California District | 97,606.47 |
| Deficiency in Income Tax..... | \$ 1,768.55 |

Schedule 4

COMPUTATION OF ALTERNATIVE TAX

| | |
|---|--------------|
| Net Income, Schedule 1..... | \$143,911.53 |
| Less: Net Long-Term Capital Gain..... | 7,613.64 |
| Ordinary Net Income..... | \$136,297.89 |
| Less: Personal Exemption..... | 500.00 |
| Surtax Net Income..... | \$135,797.89 |
| Normal Tax Net Income..... | \$135,797.89 |
| Normal Tax at 6% on \$135,797.89..... | \$ 8,147.87 |
| Surtax on \$135,797.89..... | 87,420.33 |
| Partial Tax | \$ 95,568.20 |
| Add: 50% of Net Long-Term Capital Gain..... | 3,896.82 |
| Alternative Tax | \$ 99,375.02 |

YEAR 1943

Schedule 5

ADJUSTMENT TO NET INCOME

| | Income Tax Net Income | Victory Tax Net Income |
|---|--------------------------|---------------------------|
| Net Income as Disclosed in the Deficiency Notice Dated September 20, 1945 | \$110,864.94 | \$107,811.46 |
| As Adjusted, Based on the Opinion of the Tax Court of the United States Promulgated July 22, 1947, and Stipulation of Facts Between the Parties | 112,700.79 | 109,647.31 |
| Adjustment (Increase) | \$ 1,835.85 | \$ 1,835.85 |

Schedule 6

EXPLANATION OF ADJUSTMENT

Net income is increased \$1,835.85, as a result of the opinion of The Tax Court of the United States holding that petitioner is entitled to a deduction of \$94,164.15, the amount actually distributed out of income to beneficiaries of the estate, in lieu of a deduction of \$96,000.00 as allowed in the deficiency notice.

Schedule 7

COMPUTATION OF TAX

| | |
|--|--------------|
| Net Income, Schedule 5..... | \$112,700.79 |
| Less: Personal Exemption..... | 500.00 |
| <hr/> | |
| Surtax Net Income..... | \$112,200.79 |
| Normal Tax Net Income..... | \$112,200.79 |
| Normal Tax at 6% on \$112,200.79..... | \$ 6,732.05 |
| Surtax on \$112,200.79..... | 68,778.62 |
| <hr/> | |
| Total Tax | \$ 75,510.67 |
| Alternative Tax, Schedule 8..... | 69,149.57 |
| <hr/> | |
| Income Tax..... | \$ 69,149.57 |
| Victory Tax Net Income, Schedule 5.... | \$109,647.31 |
| Less: Specific Exemption..... | 624.00 |
| <hr/> | |
| Income Subject to Victory Tax..... | \$109,023.31 |
| Victory Tax Before Credit (5% of \$109,023.31) | \$ 5,451.17 |
| Less: Victory Tax Credit..... | 500.00 |
| <hr/> | |
| Net Victory Tax..... | 4,951.17 |
| <hr/> | |
| Income and Victory Tax Liability..... | \$ 74,100.74 |
| Income and Victory Tax Liability Disclosed by Re- turn, Account No. 186677, 1st California District.. | 6,712.28 |
| <hr/> | |
| Deficiency in Income and Victory Tax..... | \$ 67,388.46 |

Schedule 8

COMPUTATION OF ALTERNATIVE TAX

| | |
|---|--------------|
| Net Income, Schedule 5..... | \$112,700.79 |
| Less: Net Long-Term Capital Gain..... | 18,536.64 |
| <hr/> | |
| Ordinary Net Income..... | \$ 94,164.15 |
| Less: Personal Exemption..... | 500.00 |
| <hr/> | |
| Surtax Net Income..... | \$ 93,664.15 |
| Normal Tax Net Income..... | \$ 93,664.15 |
| Normal Tax at 6% on \$93,664.15..... | \$ 5,619.85 |
| Surtax on \$93,664.15..... | 54,261.40 |
| <hr/> | |
| Partial Tax | \$ 59,881.25 |
| Add: 50% of Net Long-Term Capital Gain..... | 9,268.32 |
| <hr/> | |
| Alternative Tax | \$ 69,149.57 |

Received and filed Aug. 22, 1947.

[Title of Tax Court and Cause.]

CONSENT TO SETTLEMENT

The computation of the respondent filed with the Court on August 22, 1947 has been examined and found to be in accordance with the determination of the Court as set forth in its report. Petitioner therefore joins with the respondent in praying that the Court enter its decision based upon such computation, reserving however the right to contest the correctness of such decision in the appellate courts as provided by statute.

/s/ PHILIP S. EHRLICH,
Attorney for Petitioner.

Filed Sept. 10, 1947. [167]

The Tax Court of the United States
Washington

Docket No. 9786

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. DAVID ZELLERBACH and
HAROLD L. ZELLERBACH, Executors,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the report of this Court promulgated July 22, 1947, the respondent filed a proposed computation of tax on August 22, 1947, and on September 10, 1947 the petitioner filed an acquiescence in the respondent's computation. It is therefore

Ordered and Decided: That there are deficiencies in income tax for the years 1942 and 1943 in the respective amounts of \$1,768.55 and \$67,388.46.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Entered Sept. 16, 1947. [168]

[Title of Tax Court and Cause.]

PETITION OF ESTATE OF ISADORE ZELLERBACH, DECEASED, J. DAVID ZELLERBACH AND HAROLD L. ZELLERBACH, EXECUTORS, FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, OF A DECISION BY THE TAX COURT OF THE UNITED STATES.

Taxpayer, the petitioner in this cause, by Philip S. Ehrlich and Albert A. Axelrod, counsel for petitioner, hereby files its petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision by the Tax Court of the United States, promulgated on July 22, 1947, 9 T. C. No. 12, determining deficiencies in the petitioner's Federal income taxes for the calendar years 1942 and 1943 in the respective amounts of \$1,768.55 and \$67,388.46, which deficiencies were determined by The Tax Court on September 16, 1947, and respectfully shows:

I.

J. David Zellerbach and Harold L. Zellerbach are the duly [169] appointed, qualified and acting Executors of the last Will and Testament of Isadore Zellerbach, deceased, who died on August 7, 1941, a resident of the City and County of San Francisco, State of California. The Estate of Isadore Zellerbach, deceased, the petitioner herein, filed income tax returns for the years 1942 and 1943 on the cash basis with the Collector of Internal Revenue at San Francisco, California.

II.

Nature of Controversy

The controversy involves the petitioner's liability for Federal income taxes for the calendar years 1942 and 1943.

Isadore Zellerbach died testate on August 7, 1941, in the County of San Mateo, State of California, being at the time of his death a resident of the City and County of San Francisco, State of California; on the 2nd day of September, 1941, his will was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, in those certain probate proceedings entitled "In the Matter of the Estate of Isadore Zellerbach, Deceased, No. 87721", and J. David Zellerbach, Harold L. Zellerbach and Marcus M. Baruh, who were named therein as such, were appointed Executors, and Letters Testamentary were issued to them. Marcus M. Baruh died on the 6th day of April, 1942, and ever since said date J. David Zellerbach and Harold L. Zellerbach have been and now are the duly appointed, qualified and acting Executors of the last Will and Testament of [170] Isadore Zellerbach, deceased.

Under the decedent's last Will and Testament, there are certain specific legacies provided for after which the residue of the estate is directed to be distributed one-half to decedent's widow, Jennie B. Zellerbach, and one-sixth to each of the decedent's three children, to-wit, J. David Zellerbach, Harold L. Zellerbach and Claire Z. Saroni.

On August 19, 1942, the Executors of decedent's Will filed with the Probate Court a petition praying for leave to distribute the specific legacies, which petition was granted on September 2, 1942.

On November 25, 1942, the Executors filed with the Probate Court two petitions for partial distribution. In one the Executors alleged that the income of the estate (taxpayer herein) for the calendar year 1942 would approximate the sum of \$317,000.00, and prayed for an order for the Probate Court authorizing them to distribute from the income of the estate the sum of \$181,000.00 as follows:

- (a) to Jennie B. Zellerbach, the widow of the decedent, \$22,000.00;
- (b) to J. David Zellerbach, the son of decedent, \$53,000.00;
- (c) to Harold L. Zellerbach, the son of decedent, \$53,000.00;
- (d) to Claire Z. Saroni, the daughter of the decedent, \$53,000.00.

This petition [171] was heard on December 7, 1942 by the Probate Court, and was granted.

The other petition for partial distribution, which was filed on November 25, 1942, after alleging that all the gifts and legacies under the decedent's Will were distributed on September 2, 1942 and paid, prayed for permission to distribute certain assets of the estate to the residuary legatees and devisees in the proportions that they took under the Will, namely, one-half to the widow, and one-sixth to each of the children. This petition was heard by the Probate Court and granted on December 8, 1942, and the property described in the petition was ordered distributed in the proportions hereinabove set forth.

The property so distributed on December 8, 1942 had a fair market value on that date of \$1,146,000.00.

The income of the estate for the calendar year 1942, before any allowances for income distributed to the beneficiaries under the decedent's Will (the residuary legatees and devisees) was \$324,209.38, which said sum was composed of ordinary income in the amount of \$316,595.74, and capital gains in the amount of \$7,613.64.

On December 31, 1942, the estate (taxpayer herein) had assets of \$3,425,092.17 and liabilities of \$1,419,565.49, or an excess of assets over liabilities of \$1,934,526.68. This was after the distribution of \$181,000.00 in income and \$1,146,00.00 in [172] corpus, and after giving effect to all liabilities which were subsequently determined to be due.

The estate (taxpayer herein) filed income tax returns on a cash basis for the calendar year 1942 with the Collector of Internal Revenue, San Francisco, California, and claimed as a credit the amount distributed to the beneficiaries by the decree of partial distribution made by the Probate Court on December 7, 1942 and subsequently filed an amended return and claimed credit for the full amount of the income of the estate for the calendar year 1942, to-wit, the sum of \$324,209.58. The beneficiaries under the Will reported in their respective income tax returns the full amount of the estate's (taxpayer herein) income for the year 1942; the widow, Jennie B. Zellerbach, having originally reported only the amount of cash actually distributed to her, and subsequently having filed an amended return

wherein she included as income distributed to her from the estate of the decedent, one-half of the income of the estate for the year 1942, to-wit, the sum of \$157,661.87.

On November 30, 1943, the Executors filed a petition with the Probate Court for partial distribution, asking permission to distribute from the income of the estate for the year 1943 the sum of \$96,000.00, which sum was to be distributed one-third to each of the children of the decedent, and no portion of the income was asked to be distributed to the widow, Jennie B. Zellerbach. [173] The petition alleged that the income for the year 1943 would approximate the sum of \$191,500.00.

On December 13, 1943, the Probate Court made an order for partial distribution, authorizing the distribution of the amount of \$96,000.00 as prayed for.

Jennie B. Zellerbach, the widow, reported in her income tax return for the year 1943 the fact that there had been distributed from the estate of decedent (taxpayer herein) for the year 1943, the sum of \$92,664.15.

The total net income of the estate (taxpayer herein) for the year 1943, before any allowance for income distributed to beneficiaries during said year was the sum of \$206,364.94, which sum was composed of ordinary income in the amount of \$188,328.30, and capital gains in the amount of \$18,536.44.

The estate (taxpayer herein) filed its income tax return for the year 1943 on a cash basis with the

Collector of Internal Revenue, San Francisco, California, and claimed as credit for income distributed to the beneficiaries, (the legatees under the Will) the sum of \$185,528.30.

On December 31, 1943, the assets of the estate had a value of \$3,942,739.89, and the liabilities amounted to the sum of \$1,104,886.70, and the amount of the excess of assets over the liabilities was the sum of \$2,837,855.19.

The estate, other than the amounts which it owed for taxes, [174] had only two creditors on December 31, 1942, one of whom was the widow, Jennie B. Zellerbach, and the other the Wells Fargo Bank & Union Trust Co.; that the Wells Fargo Bank & Union Trust Co. would have consented to a distribution of the estate had such a request been made of it.

The State of California would have consented to the distribution of all the income in 1942, notwithstanding that the inheritance taxes had not been paid.

For the calendar year 1942 the taxpayer claimed that it was entitled to a deduction in income in the amount of \$316,957.84, which represented income received by the taxpayer during said calendar year and which the taxpayer claimed was distributable to the heirs of the decedent, (the beneficiaries of the estate) and was includable by them in their respective income tax returns. The Commissioner of Internal Revenue allowed as a deduction from such income the amount of \$181,000.00, which was the

amount actually distributed in cash by the taxpayer to the beneficiary, and refused to allow a further claimed deduction in the amount of \$135,957.84.

For the calendar year 1943 the taxpayer claimed that it was entitled to a deduction in income in the amount of \$188,297.50, which represented income received by the taxpayer during said calendar year and which the taxpayer claimed was distributable to the heirs of the decedent, (the beneficiaries of the estate) and was includable by them in their respective income tax returns. [175] The Commissioner of Internal Revenue allowed as a deduction from such income the amount of \$96,000.00, which was the amount actually distributed in cash by the taxpayer to the beneficiary, and refused to allow a further claimed deduction in the amount of \$92,297.50.

The controversy centers primarily around the interpretation of Section 162 of the Internal Revenue Code and the Regulations of the Commissioner of Internal Revenue applicable thereto.

III.

The said Estate of Isadore Zellerbach, deceased, being aggrieved by the conclusions of law contained in the opinion of the court, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

IV.

Assignments of Errors

The petitioners assigns as errors the following acts and omissions of The Tax Court of the United States:

1. The failure to allow as a deduction from the petitioner's gross income for the year 1942 the full amount of petitioner's income for the year 1942.

2. The failure to allow as a deduction from the petitioner's gross income for the year 1943 the full amount of petitioner's income for the year 1943.

3. The failure, [176] in the alternative, to allow as a deduction from the petitioner's gross income for the year 1942 the value of the property distributed to the legatees and devisees under decedent's Will during the year 1942 under the decree of partial distribution made and entered by the Probate Court during the year 1942.

4. The failure, in the alternative, to allow as a deduction from the petitioner's gross income for the year 1943 the value of the property distributed to the legatees and devisees under decedent's Will during the year 1943 under the decree of partial distribution made and entered by the Probate Court during the year 1943.

5. The failure to find that the beneficiaries under decedent's Will had a present right to the 1942 income of the estate of the decedent.

6. The failure to find that the beneficiaries under decedent's Will had a present right to the 1943 income of the estate of the decedent.

7. The findings of a deficiency for the year 1942 in the amount of \$1,768.55, in lieu of a determination that the petitioner (taxpayer) is entitled to a refund for said year in the amount of \$95,986.69, less the amount of \$24,401.61, being the amount remaining unpaid on the assessment against the petitioner (taxpayer) for said year, or a determination [177] that the petitioner (taxpayer) is entitled to a net refund of \$71,585.08.

8. The finding of a deficiency for the year 1943, in lieu of a determination that there is no income tax due from the petitioner (taxpayer) for said year.

Wherefore, petitioner prays for a review by the United States Circuit Court of Appeals, for the Ninth Circuit, of the decision by the United States Tax Court, promulgated on July 22, 1947, 9 Tax Court , No. 12, and that upon such review, said Honorable Court make and enter a decree setting aside and reversing said decision of the United States Tax Court and determine that the petitioner (taxpayer) is entitled to a refund of income taxes for the year 1942 in the net amount of \$95,986.69 less the amount of \$24,401.61 remaining unpaid on its assessment for said year, or a net refund of \$71,585.08, and a further determination that for the year 1943 there is no income tax due from petitioner.

/s/ PHILIP S. EHRLICH,

/s/ ALBERT A. AXELROD,

Counsel for Petitioner. [178]

State of California,
City and County of San Francisco—ss.

Philip S. Ehrlich and Albert A. Axelrod, each
being first duly sworn, depose and say:

That they are the attorneys and counsel for the
Executors of the Estate of Isadore Zellerbach, de-
ceased, and for J. David Zellerbach and Harold L.
Zellerbach, the petitioner in the above entitled
cause; that as such attorneys and counsel they are
authorized to verify the foregoing Petition for Re-
view; that they have read the said Petition for Re-
view and are familiar with the statements contained
therein; and that the statements made are true to
the best of their knowledge, information and belief.

/s/ PHILIP S. EHRLICH,
/s/ ALBERT A. AXELROD,

Subscribed and sworn to before me this 11th day
of October, 1947.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

Filed Oct. 14, 1947. [179]

In The United States Circuit Court of Appeals
For The Ninth Circuit

Docket No. 9786

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. DAVID ZELLERBACH and
HAROLD L. ZELLERBACH, Executors,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

NOTICE OF FILING PETITION FOR
REVIEW

To: Charles Oliphant, Chief Counsel, Bureau of
Internal Revenue:

You are hereby notified that the above petitioner did, on the 14th day of October, 1947, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is heretofore attached and served upon you.

Dated this 17th day of October, 1947.

/s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

Service of copy of Petition for Review acknowledged this October 17, 1947.

/s/ CHARLES OLIPHANT, CAR,
Chief Counsel, Bureau of
Internal Revenue,
Attorney for Respondent.

Filed T.C.U.S. Oct. 17, 1947. [180]

The Tax Court of the United States

Docket No. 9786

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. DAVID ZELLERBACH and HAR-
OLD L. ZELLERBACH, Executors,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION FOR
REVIEW

To: Charles Oliphant, Esq., Chief Counsel, Bureau
of Internal Revenue:

Please Take Notice that the petitioner, on the 14th day of October, 1947, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals, for the Ninth Circuit, of a decision of the United States Tax Court hereto-

fore rendered in the above-entitled cause, a copy of which Petition for Review and the assignment of errors as filed is hereby attached and served upon you.

Dated: San Francisco, California, October 20, 1947.

/s/ PHILIP S. EHRLICH,

/s/ ALBERT A. AXELROD,

Counsel for Petitioner.

[Affidavit of service by mail attached.]

Received and filed Oct. 31, 1947. [181]

[Title of Tax Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, with reference to a petition for review heretofore filed by the petitioner in the above entitled cause, with a transcript of the record of the above entitled cause prepared and transmitted as required by law and by the rules of said Court and to include in said transcript of record the following documents or certified copies thereof, to-wit:

1. The docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court of the United States as follows:

- (a) Petition for redetermination.

(b) Answer of the respondent. [183]

(c) Respondent's motion for leave to file the amended answer, which was filed on December 6, 1946.

(d) Respondent's amended answer, filed on December 6, 1946.

(e) Petitioner's amendment to petition for redetermination, filed December 6, 1946.

3. Stipulation of facts filed December 6, 1946.

4. Reporter's transcript of the proceedings and testimony before the Tax Court on December 6, 1946.

4½. Respondent's answer to amendment to petition, filed December 30, 1946.

5. Findings of fact and opinion of the Tax Court of the United States.

6. Notice under Rule 50.

7. Respondent's computation for entry of decision.

8. Stipulation signed by the attorney for petitioner with respect to the computation of respondent.

9. Decision of the Tax Court.

10. Petition for review filed by Petitioner in the above cause.

11. This praecipe.

12. Notice of filing petition for review.

Dated: October 27th, 1947.

/s/ PHILIP S. EHRLICH,

/s/ ALBERT A. AXELROD,

Attorneys for Petitioner.

[Affidavit of service by mail attached.]

Filed Oct. 31, 1947. [184]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 185, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 13th day of November, 1947.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11795. United States Circuit Court of Appeals for the Ninth Circuit. Estate of Isadore Zellerbach, Deceased, J. David Zellerbach and Harold L. Zellerbach, Executors, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the Tax Court of the United States.

Filed November 21, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals,
for the Ninth Circuit.

No. 11795

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. DAVID ZELLERBACH and
HAROLD L. ZELLERBACH, Executors,
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO REPLY ON THE
APPEAL, AND PARTS OF RECORD
WHICH APPELLANT THINKS NECES-
SARY FOR CONSIDERATION THEREOF.

Pursuant to the provisions of subdivision 6 of Rule 19 of the Rules of Practice of the United States Circuit Court of Appeals, for the Ninth Circuit, the appellant hereby designates the following points on which it intends to rely on the appeal in connection with the above appeal:

1. The Tax Court erred in failing to allow as a deduction from the appellant's gross income for the year 1942 the full amount of the appellant's income for the said year 1942.

2. The Tax Court erred in failing to allow as a deduction from the appellant's gross income for the year 1943 the full amount of the appellant's income for the said year 1943.

3. The Tax Court erred in failing, in the alternative, to allow as a deduction from the appellant's

gross income for the year 1942 the value of the property distributed to the legatees and devisees under the decedent's Will during the year 1942 under the Decree of Partial Distribution made and entered by the Probate Court during the year 1942.

4. The Tax Court erred in failing, in the alternative, to allow as a deduction from the appellant's gross income for the year 1943 the value of the property distributed to the legatees and devisees under the decedent's Will during the year 1943 under the Decree of Partial Distribution made and entered by the Probate Court during the year 1943.

5. The Tax Court erred in failing to find that the beneficiaries under the decedent's Will had a present right to the 1942 income of the estate of the decedent.

6. The Tax Court erred in failing to find that the beneficiaries under the decedent's Will had a present right to the 1943 income of the estate of the decedent.

7. The Tax Court erred in finding a deficiency in income taxes for the year 1942 in the amount of \$1,768.55, in lieu of a determination that the appellant was entitled to a refund for said year in the amount of \$95,986.69, less the amount of \$24,401.61, being the amount remaining unpaid on the assessment against the appellant for said year, or a determination that the appellant was entitled to a net refund of \$71,585.08.

8. The Tax Court erred in finding a deficiency in income taxes for the year 1943, in lieu of a determination that there was no income tax due from the appellant for said year.

9. An estate of a decedent is allowed an additional deduction in computing the net income of the estate, the income which is distributed to the heirs or legatees or the income which in the discretion of the Executors may be either distributed or accumulated.

10. Residuary legatees and devisees under the California Probate law are entitled to petition for a distribution of income. The estate of a decedent vests, subject to administration, in his heirs or devisees or legatees immediately upon his death.

11. Where a distribution of the corpus of an estate is made in any year that the estate has distributable income, the distribution is taxable to the legatee to the extent of the distributable income.

12. The estate having distributed to the residuary legatees corpus of a value in excess of distributable income, it is deemed that all income was distributed to the legatees.

13. The ordinary duties pertaining to the administration of the decedent's estate had been completed, and accordingly it is deemed that the estate has been distributed and the income taxable to the legatees.

That the appellant designates the entire record on appeal as necessary for the consideration of the foregoing points which appellant intends to rely on upon the appeal.

Dated: San Francisco, California, December 3, 1947.

/s/ PHILIP S. EHRLICH,

/s/ ALBERT A. AXELROD,

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Dec. 3, 1947.

No. 11,795
IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ESTATE OF ISADORE ZELLERBACH, Deceased,
J. David Zellerbach and Harold L.
Zellerbach, Executors,

Appellant,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S OPENING BRIEF.

PHILIP S. EHRLICH,
ALBERT A. AXELROD,

2002 Russ Building, San Francisco 4,

Attorneys for Appellant.

FILED

MAR 23 1948

Subject Index

| | Page |
|---|------|
| (a) Statement of jurisdiction | 1 |
| (b) Statement of the case | 2 |
| Specifications of errors | 8a |
| Argument | 9 |
| The tax court erred in failing to allow as a deduction from the appellant's gross income for each of the years 1942 and 1943 the full amount of appellant's income for each of said years | 9 |
| An estate of a decedent (appellant herein) is allowed an additional deduction in computing the net income of the estate, the income which is distributed to the heirs or legatees or the income which in the discretion of the executors may be either distributed or accumulated | 9 |
| Residuary legatees and devisees under the California probate law are entitled to petition for a distribution of income during the administration of the estate | 29 |
| Where a distribution of the corpus of an estate is made in any year that the estate has distributable income, the distribution is taxable to the legatee to the extent of the distributable income | 35 |
| The estate having distributed to the residuary legatees corpus of a value in excess of distributable income, it is deemed that all income was distributed to the legatees..... | 35 |
| The ordinary duties pertaining to the administration of the decedent's estate had been completed, and accordingly it is deemed that the estate has been distributed and the income taxable to the legatees | 44 |
| Conclusion | 46 |

Table of Authorities Cited

| Cases | Pages |
|---|--------------|
| Almira A. Wick v. Commissioner (Memorandum Decision), Docket No. 109506, entered January 15, 1943, 1 Tax Court Memorandum Decisions 434 | 40 |
| Estate of Andrew J. Igoe v. Commissioner, 6 T. C. 639.. | 27, 28 |
| Estate of Bernal, 165 Cal. 223 | 32 |
| Estate of Chesney, 1 Cal. App. 30 | 18 |
| Estate of Clifford, 16 Cal. App. (2d) 123..... | 20 |
| Estate of Henry S. Stephenson, 65 Cal. App. (2d) 120.. | 17, 18, 20 |
| Estate of Hinkel, 176 Cal. 563 | 18 |
| Estate of Johnson, 218 Cal. 501 | 15, 44 |
| Estate of Matthiessen, 23 Cal. App. (2d) 608..... | 34 |
| Estate of Webster, 60 Cal. App. (2d) 524 | 15 |
| In re Crocker, 105 Cal. 368 | 17 |
| Mary Pyne Filley v. Commissioner, 45 B.T.A. 826 | 24 |
| Noble v. Beach, 21 Cal. (2d) 91 | 30 |
| Reed v. Hayward, 23 Cal. (2d) 336 | 30 |

Statutes

Internal Revenue Code:

| | |
|--------------------------|----------------|
| Section 115(b) | 38 |
| Section 162 | 9 |
| Section 162(b) | 9, 38 |
| Section 162(c) | 10, 27, 40, 46 |
| Section 162(d) | 42 |
| Section 162(d) (1) | 36, 37, 43, 46 |

Probate Code:

| | |
|--------------------|--------|
| Section 300 | 30 |
| Section 956 | 12 |
| Section 1000 | 12 |
| Section 1001 | 12, 15 |

| Revenue Act of 1942: | Pages |
|----------------------|-------|
| Section 111 | 38 |
| Section 111(e) | 37 |

Miscellaneous

| | |
|---|----|
| General Counsel's Memorandum 22034-25-10297, page 3 ... | 30 |
| General Counsel's Memorandum 24702, 1945-19-12141, page 9 | 38 |

Regulations 111:

| | |
|---------------------------|------------|
| Section 29.162-1 | 11, 28 |
| Section 29.162-1(c) | 45 |
| Section 29.162-2(a) | 41 |
| Section 29.162-2(b) | 11, 24, 28 |

No. 11,795

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ESTATE OF ISADORE ZELLERBACH, Deceased,
J. David Zellerbach and Harold L.
Zellerbach, Executors,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S OPENING BRIEF.

(a) STATEMENT OF JURISDICTION.

This is an appeal by a taxpayer from a decision of The Tax Court of the United States assessing deficiencies against appellant in income taxes for the years 1942 and 1943 in the respective amounts of \$1,768.55 and \$67,388.46, which decision was entered September 16, 1947. (Tr. p. 165.)

The opinion upon which said decision is based is reported in 9 Tax Court 89, and is likewise set forth at length on pages 136 to 165 of the Transcript of Record.

The Tax Court had jurisdiction of the controversy by reason of the fact that appellant's income tax re-

turns were filed with the Collector of Internal Revenue at San Francisco, and by further reason of the appellee's "Notice of Deficiency" dated September 20, 1945, addressed to appellant, a copy of which is attached as Exhibit "A" to appellant's petition filed with The Tax Court of the United States on December 12, 1945, and which appears at pages 10 to 17 of the Transcript of Record. The petition for a redetermination of the deficiency is set forth on pages 4 to 17 of the Transcript of Record.

A petition for a review by this Honorable Court of the decision of The Tax Court was filed with the Clerk of The Tax Court on October 14, 1947. (Tr. pp. 166 to 175.)

(b) STATEMENT OF THE CASE.

The controversy was submitted to The Tax Court for decision upon a written Stipulation of Facts (Tr. pp. 24 to 106) and the oral testimony of three witnesses.

The facts are stated in the Findings of Fact of The Tax Court. (Tr. pp. 137 to 145.) The following is a summary of the facts:

Isadore Zellerbach died testate on August 7, 1941, in the County of San Mateo, State of California, being at the time of his death a resident of the City and County of San Francisco, State of California; on the 2nd day of September, 1941 his will was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Fran-

cisco, in those certain probate proceedings entitled “In the Matter of the Estate of Isadore Zellerbach, Deceased, No. 87,721”, and J. David Zellerbach, Harold L. Zellerbach and Marcus M. Baruh, who were named therein as such, were appointed Executors, and Letters Testamentary were issued to them. Marcus M. Baruh died on the 6th day of April, 1942, and ever since said date J. David Zellerbach and Harold L. Zellerbach have been and now are the duly appointed, qualified and acting Executors of the last will and testament of Isadore Zellerbach, deceased. A copy of the said last will and testament of Isadore Zellerbach is attached to the stipulation of facts and marked Exhibit “A”. (Tr. pp. 30 to 35.)

Under the decedent’s last will and testament, there are certain specific legacies provided for after which the residue of the estate is directed to be distributed one-half to decedent’s widow, Jennie B. Zellerbach, and one-sixth to each of the decedent’s three children, to-wit, J. David Zellerbach, Harold L. Zellerbach and Claire Z. Saroni. (Exhibit “A”, stipulation of facts, Tr. p. 34.)

On August 19, 1942, the executors of decedent’s will filed with the Probate Court a petition praying for leave to distribute the specific legacies, which petition was granted on September 2, 1942. (Exhbits “E” and “F”, stipulation of facts, Tr. pp. 55 to 66.)

On November 25, 1942, the executors filed with the Probate Court two petitions for partial distribution. In one the executors alleged that the income of the

estate (appellant herein) for the calendar year 1942 would approximate the sum of \$317,000.00, and prayed for an order of the Probate Court authorizing them to distribute from the income of the estate the sum of \$181,000.00 as follows: (a) to Jennie B. Zellerbach, the widow of the decedent, \$22,000.00; (b) to J. David Zellerbach, the son of decedent, \$53,000.00; (c) to Harold L. Zellerbach, the son of decedent, \$53,000.00; (d) to Claire Z. Saroni, the daughter of decedent, \$53,000.00. (Exhibit "G", stipulation of facts, Tr. pp. 62 to 65.)

This petition was heard on December 7, 1942 by the Probate Court, and was granted. (Exhibit "H", stipulation of facts, Tr. pp. 66 to 68.)

The other petition for partial distribution, which was filed on November 25, 1942, after alleging that all the gifts and legacies under the decedent's will were distributed on September 2, 1942 and paid, prayed for permission to distribute certain assets of the estate to the residuary legatees and devisees in the proportions that they took under the will, namely, one-half to the widow, and one-sixth to each of the children. (Exhibit "I", stipulation of facts, Tr. pp. 68 to 72.) This petition was heard by the Probate Court and granted on December 8, 1942, and the property described in the petition was ordered distributed in the proportions hereinabove set forth. (Exhibit "J", stipulation of facts, Tr. pp. 72 to 74.) The property so distributed on December 8, 1942 had a fair market value on that date of \$1,146,000.00. (Paragraph 25, stipulation of facts, Tr. pp. 28.)

The income of the estate for the calendar year 1942, before any allowances for income distributed to the beneficiaries under the decedent's will (the residuary legatees and devisees) was \$324,209.38, which said sum was composed of ordinary income in the amount of \$316,595.74, and capital gains in the amount of \$7,613.64. (Paragraph 19, stipulation of facts; Tr. pp. 27 to 28.)

On December 31, 1942, the estate (appellant herein) had assets of \$3,425,092.17 and liabilities of \$1,419,565.49, or an excess of assets over liabilities of \$1,934,526.68. This was after the distribution of \$181,000.00 in income and \$1,146,000.00 in corpus, and after giving effect to all liabilities which were subsequently determined to be due. (Exhibit "S", stipulation of facts, Tr. pp. 99 to 103.)

The estate (appellant herein) filed income tax returns on a cash basis for the calendar year 1942 with the Collector of Internal Revenue at San Francisco, California, and claimed as a credit the amount distributed to the beneficiaries by the decree of partial distribution made by the Probate Court on December 7, 1942, and subsequently filed an amended return and claimed credit for the full amount of the income of the estate for the calendar year 1942, to-wit, the sum of \$324,209.58. (Paragraph 2 and Exhibit "C", stipulation of facts, Tr. pp. 24 to 25 and pp. 37 to 48.)

The beneficiaries under the will reported in their respective income tax returns the full amount of the estate's (appellant herein) income for the year 1942; the widow, Jennie B. Zellerbach, having originally

reported only the amount of cash actually distributed to her, and subsequently having filed an amended return wherein she included as income distributed to her from the estate of the decedent, one-half of the income of the estate for the year 1942, to-wit, the sum of \$157,661.87. (Paragraph 28, stipulation of facts, Tr. p. 29.)

On November 30, 1943, the executors filed a petition with the Probate Court for partial distribution, asking permission to distribute from the income of the estate for the year 1943 the sum of \$96,000.00, which sum was to be distributed one-third to each of the children of the decedent, and no portion of the income was asked to be distributed to the widow, Jennie B. Zellerbach. The petition alleged that the income for the year 1943 would approximate the sum of \$191,500.00. (Exhibit "Q", stipulation of facts, Tr. pp. 93 to 97.)

On December 13, 1943, the Probate Court made an order for partial distribution, authorizing the distribution of the amount of \$96,000.00 as prayed for. (Exhibit "R", stipulation of facts, Tr. pp. 97 to 99.)

Jennie B. Zellerbach, the widow, reported in her income tax return for the year 1943 the fact that there had been distributed to her from the estate of decedent for the year 1943, the sum of \$92,664.15. (Paragraph 29, stipulation of facts, Tr. p. 29.)

The total net income of the estate for the year 1943, before allowance for income distributed to beneficiaries during said year was the sum of \$206,364.94,

which sum was composed of ordinary income in the amount of \$188,328.30, and capital gains in the amount of \$18,536.44. (Paragraph 20, stipulation of facts, Tr. p. 28.)

The estate filed its income tax return for the year 1943 on a cash basis with the Collector of Internal Revenue at San Francisco, California, and claimed as credit for income distributed to the beneficiaries (the residuary devisees and legatees under the will), the sum of \$185,528.30. (Exhibit "D", stipulation of facts, Tr. pp. 49 to 54.)

On December 31, 1943, the assets of the estate had a value of \$3,942,739.89, and the liabilities amounted to the sum of \$1,104,886.70, and the amount of the excess of assets over the liabilities was the sum of \$2,837,855.19. (Exhibit "T", stipulation of facts, Tr. pp. 103 to 106.)

The estate, other than the amounts which it owed for taxes, had only two creditors on December 31, 1942, one of whom was the widow, Jennie B. Zellerbach, and the other the Wells Fargo Bank & Union Trust Co.; the Wells Fargo Bank & Union Trust Co. would have consented to a distribution of the estate had such a request been made of it. (Testimony of Julius Eisenbach, Tr. pp. 128 to 134.)

The State of California would have consented to the distribution of all the income in 1942, notwithstanding that the inheritance taxes had not been paid. (Testimony of Richard O'Connor, Deputy Inheritance Tax Attorney for the State of California, Tr. pp. 123 to 128.)

It is the appellant's contention that at the time the respective distributions of income and corpus were made, the estate was in such condition that it could have been closed; that Jennie B. Zellerbach, the widow of decedent, as a matter of right was entitled to have distributed to her one-half of the income of the estate for each of the years 1942 and 1943, and that if either she or the Executors had petitioned the Probate Court for such distribution, it would have been granted (Testimony of Judge Timothy I. Fitzpatrick, Probate Judge who had charge of the estate of decedent, Tr. pp. 115 to 123); that if appellant's contentions are correct, then the appellant was entitled to a deduction in computing the net income of the estate for the years 1942 and 1943 of the full amount of the income which the estate either distributed to the legatees or could have distributed to the legatees, which was the entire net income of the estate for each of said years.

SPECIFICATIONS OF ERRORS.

The appellant relies upon the following specifications of errors which are set forth as assignments of errors on pages 173 and 174 of the Transcript of Record:

1. The failure of the Tax Court to allow as a deduction from the appellant's gross income for the year 1942 the full amount of appellant's income for the year 1942.

2. The failure of the Tax Court to allow as a deduction from the appellant's gross income for the year 1943 the full amount of appellant's income for the year 1943.

3. The failure of the Tax Court to find that the beneficiaries under decedent's Will had a present right to the 1942 income of the estate of the decedent.

4. The failure of the Tax Court to find that the beneficiaries under decedent's Will had a present right to the 1943 income of the estate of the decedent.

Note: The foregoing specifications of errors are discussed in the paragraphs having the following paragraph headings:

The Tax Court Erred in Failing to Allow as a Deduction from the Appellant's Gross Income for Each of the Years 1942 and 1943 the Full Amount of Appellant's Income for Each of Said Years. (Page 9.)

An Estate of a Decedent (Appellant Herein) Is Allowed An Additional Deduction in Computing the Net Income of the Estate, the Income Which Is Distributed to the Heirs or Legatees

or the Income Which in the Discretion of the Executors May Be Either Distributed or Accumulated. (Page 9.)

* * * * *

Residuary Legatees and Devisees Under the California Probate Law Are Entitled to Petition for a Distribution of Income During the Administration of the Estate. (Page 29.)

* * * * *

The Ordinary Duties Pertaining to the Administration of the Decedent's Estate Had Been Completed, and Accordingly It Is Deemed That the Estate Has Been Distributed and the Income Taxable to the Legatees. (Page 44.)

* * * * *

5. The failure of the Tax Court, in the alternative, to allow as a deduction from the appellant's gross income for the year 1942 the value of the property distributed to the legatees and devisees under decedent's Will during the year 1942 under the decree of partial distribution made and entered by the Probate Court during the year 1942.

6. The failure of the Tax Court, in the alternative, to allow as a deduction from the appellant's gross income for the year 1943 the value of the property distributed to the legatees and devisees under decedent's Will during the year 1943 under the decree of partial distribution made and entered by the Probate Court during the year 1943.

Note: Specifications of Errors Nos. 5 and 6 are discussed in the paragraph having the following paragraph headings:

Where a Distribution of the Corpus of An Estate Is Made in Any Year That the Estate Has Distributable Income, the Distribution Is Taxable to the Legatee to the Extent of the Distributable Income.

The Estate Having Distributed to the Residuary Legatees Corpus of a Value in Excess of Distributable Income, It Is Deemed That All Income Was Distributed to the Legatees. (Page 35.)

7. The findings of the Tax Court of a deficiency for the year 1942 in the amount of \$1,768.55, in lieu of a determination that the appellant (taxpayer) is entitled to a refund for said year in the amount of \$95,986.69, less the amount of \$24,401.61, being the amount remaining unpaid on the assessment against the appellant (taxpayer) for said year, or a determination that the appellant (taxpayer) is entitled to a net refund of \$71,585.08.

8. The finding of the Tax Court of a deficiency for the year 1943, in lieu of a determination that there is no income tax due from the appellant (taxpayer) for said year.

Note: The foregoing specifications of errors are matters of computation and can only be definitely determined after the decision of this Honorable Court.

ARGUMENT.

THE TAX COURT ERRED IN FAILING TO ALLOW AS A DEDUCTION FROM THE APPELLANT'S GROSS INCOME FOR EACH OF THE YEARS 1942 AND 1943 THE FULL AMOUNT OF APPELLANT'S INCOME FOR EACH OF SAID YEARS.

AN ESTATE OF A DECEDENT (APPELLANT HEREIN) IS ALLOWED AN ADDITIONAL DEDUCTION IN COMPUTING THE NET INCOME OF THE ESTATE, THE INCOME WHICH IS DISTRIBUTED TO THE HEIRS OR LEGATEES OR THE INCOME WHICH IN THE DISCRETION OF THE EXECUTORS MAY BE EITHER DISTRIBUTED OR ACCUMULATED.

The appellant contends, among other things, that under the provisions of Section 162 of the Internal Revenue Code, that the estate of the decedent (appellant herein) is allowed an additional deduction in computing the net income of the estate, the income which is distributed to the heirs or legatees, *or the income which in the discretion of executors may be either distributed or accumulated*; that notwithstanding the fact that Probate Court orders were not obtained authorizing the distribution of all of the income of the estate for the particular years involved in this appeal that under the particular facts in this case, the provisions of Section 162 of the Internal Revenue Code and the Commissioner's Regulations based upon this section, and which are hereinafter set forth at length, it will be deemed that such income was in fact distributed to the heirs or legatees, and accordingly the estate is entitled to a credit for the full amount thereof.

Section 162(b) of the Internal Revenue Code provides as follows:

“Sec. 162. *Net Income.* * * *

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, ‘income which is to be distributed currently’ includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;”

Section 162 (c) of the Internal Revenue Code provides:

“Sec. 162. *Net Income.* * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estates, *and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated*, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary;” (Italics ours.)

Section 29.162-1 of Regulations 111 relating to Income provides in part as follows:

“From the gross income of the estate or trust there are also deductible * * * the following:

(b) Any income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to a legatee, heir, or beneficiary, *whether or not such income is actually distributed*. For this purpose, it is provided in section 162(b) that ‘income which is to be distributed currently’ includes income of the estate or trust which, within the taxable year, becomes payable to the legatee, heir or beneficiary.

(c) Any income of the estate of a deceased person for its taxable year which is properly paid or credited during such year to a legatee or heir, and any income either of such an estate or of a trust for its taxable year which is similarly paid or credited during that year to a legatee, heir or beneficiary *if there is vested in the fiduciary a discretion either to distribute or to accumulate such income.*” (Italics ours.)

Section 29.162-2(b) of the same Regulations provides in part:

“As used in Section 162, the term ‘income which becomes payable’ means income to which the legatee, heir or beneficiary has a present right, *whether or not such income is actually paid*. Such right may be derived from the directions in the trust instrument or will to make distributions of an income at a certain date, *or from the exercise of the fiduciary’s discretion to distribute income, or from a recognized present right under the local*

law to obtain income or compel a distribution of income." (Italics ours.)

We turn now to the evidence in this case and an analysis of the California Probate Code as applicable herein.

Section 956 of the California Probate Code provides as follows:

"If all the debts have been paid by the first order for payment the court must direct the payment of legacies and a distribution of the estate among the persons entitled, as provided in the next chapter; but if there are debts remaining unpaid, or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for such time as may be reasonable."

Section 1000 of the California Probate Code provides in part as follows:

"At any time after the lapse of four months from the issuance of letters testamentary or of administration, the executor or administrator, or any heir, devisee or legatee, * * * may petition the court to distribute a legacy, devise or share of the estate, or any portion thereof, to any person entitled thereto, upon such person giving a bond as hereinafter provided * * *"

Section 1001 of the California Probate Code provides as follows:

"If, at the hearing, it appears that the estate is but little indebted and that all inheritance taxes payable in said proceeding have been paid, or that

the State Controller, an inheritance tax attorney, or an assistant inheritance tax attorney has in writing consented to said distribution and the legacy, devise or share of the estate, or any portion thereof, may be distributed to the person entitled thereto, without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver the legacy, devise or share of the estate or such portion thereof as the court may designate, to the person entitled thereto, upon receiving from such person a bond executed by him, and payable to the executor or administrator in such sum as the court may designate, with sureties to be approved by the judge, and conditioned for the payment, whenever required, of the proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate, so ordered to be delivered. When the time for filing or presenting claims has expired, and all uncontested claims have been paid or are sufficiently secured by mortgage or otherwise, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond.”

The evidence in this case shows that the decedent died August 7, 1941, and that his will was admitted to probate on September 2, 1941, and that on November 25, 1942, when the executors filed two petitions for partial distribution (Exhibits “G” and “I”, stipulation of facts, Tr. pp. 62 to 65 and 68 to 72), more than one year had expired since the issuance of letters testamentary.

The evidence further shows that the estate, comparatively speaking, was little indebted; that the principal indebtedness was to the Wells Fargo Bank & Union Trust Co. of San Francisco, which indebtedness was amply secured. Julius Eisenbach, who was called as a witness by the petitioner, testified that he was Vice President of the Wells Fargo Bank & Union Trust Co., in charge of credits (Tr. p. 128); that in 1942, if the executors had requested the Wells Fargo Bank & Union Trust Co. for permission to distribute the estate without paying the loan, the bank would have consented. (Tr. p. 130.)

Richard C. O'Connor was another witness who testified on behalf of the petitioner. He testified he was a Deputy Inheritance Tax Attorney for the State of California, connected with the State Controller's Office of the State of California, which office has charge of inheritance taxes for the State of California, and that as such Deputy Inheritance Tax Attorney, he had under his jurisdiction in 1942 the Estate of Isadore Zellerbach, deceased (Tr. p. 124); that if a request had been made to his office in 1942 for a distribution of the entire income of the estate for the year 1942, without the payment of the inheritance taxes that his office would have consented to such distribution. (Tr. pp. 125 to 126.)

A partial distribution may be made without payment of inheritance taxes if the State Controller, an

Inheritance Tax Attorney or an Assistant Inheritance Tax Attorney consents to such distribution in writing.

California Probate Code, Section 1001;

Estate of Johnson, 218 Cal. 501, p. 504;

Estate of Webster, 60 Cal. App. (2d) 524, p. 528.

As hereinafter appears, the State Controller did give his consent to the distributions which were made.

The will of the decedent directs that the residue of the estate of the decedent be distributed three-sixths to decedent's widow, Jennie B. Zellerbach, and three-sixths to decedent's children, one-sixth to each. (Exhibit "A", stipulation of facts, Tr. p. 34.) Based upon these provisions of the will, the executors filed their petitions for a partial distribution of the income in 1942 and 1943 (Exhibits "G" and "Q", stipulation of facts, Tr. pp. 62 to 65; Tr. pp. 93 to 96) and the decrees of partial distribution were based on these provisions of the will, namely, three-sixths of the income was distributed to the children. (Exhibits "H" and "R", stipulation of facts, Tr. p. 66 and pp. 97 to 99.) With respect to the decree made on December 7, 1942, (Exhibit "H", stipulation of facts, Tr. p. 66) as we pointed out, an arbitrary amount of \$22,000.00 was distributed to the widow, whereas in the decree made on December 13, 1943 (Exhibit "R", stipulation of facts, Tr. pp. 97 to 99) no amount whatsoever was distributed to the widow.

At this time we would like to call particular attention to the following language which appears in the

decree of December 7, 1942 (Exhibit "H", stipulation of facts, Tr. pp. 66 to 67), and which appears in substantially the same form in each and every other decree of partial distribution.

"The Court, after hearing the evidence, finds that all the allegations of said petition are true; that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to the said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;"

The Court having made such a finding and having distributed one-half of the income in both 1942 and 1943 to the children, we contend that if either the executors or the widow had petitioned in each of said years to distribute the full one-half of the income to the widow for each of said years, it would have been mandatory for the Court to have granted such petitions.

In support of this contention, we call attention to a comparatively recent decision of the California District Court of Appeal for the Second District (hearing denied by California Supreme Court) entitled "*Es-*

tate of Henry S. Stephenson, deceased”, reported in 65 Cal. App. (2d) 120, wherein the Court states on page 123 of the opinion:

“The proceedings for partial distribution of an estate prior to final distribution have been authorized at all times since the establishment of the probate courts in California. The provisions now in effect on the subject are sections 1000 and 1001 of the Probate Code. *It is made mandatory by section 1001 that the court make the order of distribution*, for it is there provided that if it appears that the estate is but little indebted and that inheritance taxes have been paid and that the distribution of the portion of the estate may be made without loss to creditors or injury to others ‘the court shall make an order’ for the delivery of the share of the estate or such portion thereof as the court may designate to the person entitled thereto.

* * * * *

“The Probate Code clearly gives power to the court to order a partial distribution of an estate and, given the prescribed conditions, it is made mandatory upon the court to make the order.”
(Italics ours.)

See also the leading case of *In re Crocker*, 105 Cal. 368, at page 371, where the California Supreme Court stated:

“The finding by the court that the estate was but little indebted is objected to by appellants upon the ground that these words are intended to ‘operate only where, as a matter of fact and absolutely, the estate, no matter what its size, was but little indebted.’ These statutory words were

intended to be used relatively, and not absolutely, and they merely refer to a 'condition of things in which the debts are small when considered in connection with the value of the estate.' Hence, it follows that the contention of appellants on this point cannot be sustained."

To the same effect, see:

Estate of Chesney, 1 Cal. App. 30, at p. 34.

Estate of Hinkel, 176 Cal. 563, at p. 566.

We also call attention to the testimony of Judge Timothy I. Fitzpatrick, the Probate Judge, in whose court and under whose jurisdiction the decedent's estate was being probated. He testified that if petitions had been presented to him in 1942 and 1943 by the executors or the legatees for the distribution of the entire income of the estate for each of said years, he would have granted such petitions. (Tr. pp. 115 to 122.)

The Tax Court in its opinion, in discussing the foregoing case of the *Estate of Henry S. Stephenson, deceased*, supra, states as follows:

"It is true that in the case of *In Re Stephenson's Estate*, 150 Pac. (2d) 222, upon which petitioners primarily rely, it is stated that 'It is made mandatory by section 1001 that the court make the order of distribution.' The court, however, immediately modifies that statement for it continues as follows:

* * * for it is there provided that if it appears that the estate is but little indebted and that inheritance taxes have been paid and that the distribution of the portion of the estate may be made

without loss to creditors or injury to others 'the court shall make an order' for the delivery of the share of the estate or such portion thereof as the court may designate to the person entitled thereto. * * *

The Probate Code clearly gives power to the court to order a partial distribution of an estate and, given the prescribed conditions, it is made mandatory upon the court to make the order. But to exercise that power accurately it is necessary that it first be determined what persons are entitled to the order and what portion or portions of the estate should be distributed to them. * * *

The court thus recognizes that the mandate is subject to certain conditions so that in the last analysis the order of distribution is subject to the judgment and discretion of the Probate Court.

The beneficiaries had no present right to the 1942 and 1943 income. They merely had a potential right thereto, which, as to the amount in dispute, was neither recognized nor enforced. The 1942 and 1943 income of the estate was not income of the estate 'to be distributed currently' as provided in section 162 (b). Estate of Andrew J. Igoe, 6 T. C. 639."

However, we point out, with all due respect to the Tax Court, that it overlooked three very important facts which were present in the Estate of Isadore Zellerbach (appellant herein), and which facts no longer gave the Probate Court any discretion with reference to the petitions for partial distribution but would have made it mandatory to grant said petitions.

First, as we have already pointed out, in the decrees of partial distribution by which a portion of the income was distributed in both the years 1942 and 1943, the court found that the time for filing claims against the estate had expired; that all claims which had been filed had been allowed, approved and paid; that the federal estate tax, as shown by the return, had been paid; that the State Controller had consented in writing to the distribution; that all personal property taxes due and payable by the estate had been paid, and that the distribution prayed for in the petition could be allowed as prayed for therein without injury to the estate or any person interested therein, and that after the distribution sufficient assets would remain in the hands of the executors to pay all debts and expenses of administration.

Accordingly, the Court made a finding on every point which would be necessary for it to have exercised its discretion, but having found as it did it no longer had any discretion to exercise, and the duty became mandatory upon the Probate Court to make the partial distribution. This is clearly illustrated by the language of the decision *In re Stephenson, supra*, quoted by the Tax Court, wherein the California District Court of Appeal stated: "and, given prescribed conditions, it is made mandatory upon the court to make the order."

See also *Estate of Clifford*, 16 Cal. App. (2d) 123, wherein the Court states, at pages 126-127:

“It is ordinarily true that all proper issues of facts joined in probate proceedings like any civil action must be determined and that the court should adopt appropriate findings respecting such issues. (Sec. 1230, Probate Code; *Estate of Pendell*, 216 Cal. 384 [14 Pac. (2d) 506]; *Estate of Exterstein*, 2 Cal. (2d) 13 [38 Pac. (2d) 151]; 11A Cal. Jur. 171, sec. 104; 11B Cal. Jur. 707, sec. 1228.) In the order for partial distribution which was signed and filed in this proceeding the court did find:

‘That all inheritance taxes due from the distributees and all personal property taxes due and payable by the estate, have been paid; and that said estate is but little indebted, and that the share of the petitioner asked for may be allowed to him without loss to creditors of the estate, and that no injury can result to the estate therefrom,
* * *

‘It is ordered * * * that the said Gladys Vice, as the administratrix with the will annexed of said estate, forthwith deliver to E. E. Keyes * * * the following described property, to-wit, the sum of One Thousand Dollars, * * *’

The preceding findings include a determination of all the ultimate facts which are required by sections 1000 and 1001 of the Probate Code on a petition for partial distribution.”

All the prescribed conditions were present in the Estate of Isadore Zellerbach. If the executors had petitioned for the distribution of the entire income in 1942 instead of only a portion of the income, the prescribed conditions would not have changed because, as

the record shows, on the very same day that the executors filed a petition for partial distribution of \$181,000 in income out of a total of \$317,000 income for said year (Tr. pp. 62 to 65), they filed a petition for a partial distribution of corpus of the trust estate (Tr. pp. 68 to 72), which corpus it was agreed had a fair market value on the date it was distributed of \$1,146,000. (Paragraph 25, stipulation of facts, Tr. p. 28.) The decree distributing the income was made on December 7, 1942 (Tr.. pp. 66 to 68), and by that decree of distribution the \$181,000 of income was there distributed arbitrarily to the widow \$22,000, and the balance was distributed \$53,000 to each of the children, the latter amount representing one-sixth of the estimated income for the year 1942, each of the children being entitled to one-sixth of the residue of the state. (Tr. p. 67.) On the other hand the corpus of the trust estate which was distributed on December 8, 1942 was distributed one-half to the widow and one-sixth to each of the children, which was in accordance with the will. (Tr. p. 74.)

Secondly, it is axiomatic that if the executors or Jennie B. Zellerbach had petitioned the Probate Court for a distribution of one-half of the full income of the estate for the year 1942, after the decree for partial distribution had been made, that the Probate Court would have had no alternative but to have granted such petition, as it could not make a distribution to some of the residuary legatees of their proportionate share of the income and refuse to grant

another residuary legatee her proportionate share of the income on like terms.

Practically the same situation prevailed for the year 1943. On November 30, 1943, it was estimated that the income of the estate for the year 1943 was the sum of \$191,500, and on that day the executors filed a petition to distribute one-half of that income to the three children, share and share alike, and did not request the distribution of any of the income to the widow who was entitled to the other one-half thereof. (Tr. pp. 93 to 97.) On December 13, 1943, the Probate Court made an order distributing the income as prayed for in said petition, and made the same findings as it had in its previous decrees of partial distribution. (Tr. pp. 97 to 99.)

However, during the earlier part of the year 1943 when the executors had desired to distribute a part of the corpus of the trust estate, they petitioned to distribute it one-half to the widow and one-sixth to each of the children. (Petition for partial distribution filed June 18, 1943, Tr. pp. 80 to 83; petition for distribution filed August 4, 1943, Tr. pp. 87 to 90.) The decree for partial distribution granting these petitions, distributed this property in accordance with the prayer of the respective petitions. (Tr. pp. 84 to 86, and 91 to 93.)

In view of the foregoing, we submit that the record in this case shows, without question, that Jennie B. Zellerbach, decedent's widow, had a "present right" in both 1942 and 1943 to one-half of the entire income

of the estate for each of said years, and that such right came both from the executors' discretion to distribute income and from the probate law of the State of California. That she recognized such right is evidenced by the fact that on January 24, 1944, she filed an amended income tax return for the year 1942, wherein she reported as having been distributed to her one-half of the income for the Estate of Isadore Zellerbach for the year 1942 (Paragraph 28, stipulation of facts, Tr. p. 29), and in her income tax return for the year 1943 she included one-half of the income of the estate for said year. (Paragraph 29, stipulation of facts, Tr. p. 29.)

The third point we urge is that the fact that the income was not paid to Jennie B. Zellerbach does not alter the situation, for as we have already pointed out, Section 29.162-2(b) of the Regulations provides in part as follows:

“As used in Section 162, the term ‘income which becomes payable’ means income to which the legatee, heir, or beneficiary has a present right, whether or not such income is actually paid. Such right may be derived from the directions in the trust instrument or will to make distributions of income at a certain date, or from the exercise of the fiduciary’s discretion to distribute income, or from a recognized present right under the local law to obtain income or compel a distribution of income.”

We would also like to call attention to the language of the Tax Court in the case of *Mary Pyne Filley v.*

Commissioner, 45 B.T.A. 826, which while a trust case and prior to the adoption of the 1942 amendment, nevertheless contains language which we contend strongly supports our contentions. We quote in part from the opinion starting at page 829, as follows:

“It is provided in section 162(b) of the Revenue Act of 1936 that a trust shall be allowed a deduction of the amount of the income of the ‘trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries’, and in Section 162(c) that ‘in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated’, the amount which is properly paid or credited during such year to the beneficiary shall be allowed as a deduction. The amount allowed as a deduction under either of the above provisions is required to be included in computing the net income of the beneficiary. The Commissioner has made his determination upon the theory that the income of each trust was taxable to the beneficiary under Section 162(b) as income which was to be distributed currently by the fiduciary to the beneficiary. Actual receipt by the beneficiary during the taxable year is not essential under that provision. Cf. *Freuler v. Helvering*, 291 U. S. 35; *Willcuts v. Ordway*, 19 Fed. (2d) 917. The petitioner contends that the trustee had the discretion to accumulate the income of this trust or to distribute it to the beneficiary, consequently, (c) applies, and, since none of the income was actually paid to the beneficiary during the year, none of it is taxable to the petitioner. Although the proof does not show that the income was not properly credited to the peti-

tioner during the year, decision need not turn upon this failure of proof.

'Accumulated' in (c) is used in opposition to 'distributed currently' in (b). The latter is intended to cover all cases where the trust instrument imposes a duty upon the trustees to make a prompt or periodic distribution of the trust income to the beneficiary. *Commissioner v. Stearns*, 65 Fed. (2d) 371; *Commissioner v. First Trust & Deposit Co.*, 118 Fed. (2d) 449, affirming 41 B.T.A. 107; *Freuler v. Helvering*, supra; *Florence M. Smith, Executrix*, 5 B.T.A. 225. Cf. *Albert J. Appell et al., Executors*, 10 B.T.A. 1225. (c), by its express terms, covers only those cases where the fiduciary has the right and the duty to choose between prompt distribution and accumulation beyond the time when a prompt distribution would normally have been made. Discretion requires the exercise of judgment and reason. It involves consideration of whether, on the one hand, there is good reason to distribute and no justification for withholding, or whether, instead, he should deliberately refrain from distributing at the usual time and withhold for some definite reason which, in his opinion, better carries out the purpose of the trust than would a current distribution. A provision for the distribution of 'net' income does not make (b) inapplicable. This is so even though distribution is not to be made until after the close of the year in which the income is earned by the trust. Income which is distributed annually is being distributed currently, as well as promptly and periodically, and comes within (b), upon authority of the cases above cited. The grantor in the present case did not intend that the income of

either trust should be accumulated within the meaning of that word as it is used in (c), but intended that the income should be distributed currently to the beneficiary within the meaning of (b). This is apparent from the words he used in the trust instruments. Similar words have been similarly interpreted. Cf. *Leo A. Balzereit et al., Guardians*, 38 B.T.A. 345; *affd.*, 107 Fed. (2d) 1008; *Leonard Marx*, 39 B.T.A. 537; *Sewell v. United States*, 19 Fed. Supp. 657. The only discretion given under the two trusts here in question was a discretion to the trustees of the *inter vivos* trust to pay the income directly to the beneficiary or to apply the same to her use and benefit. That is not a discretion to accumulate within the trust and is not the kind of discretion which brings the case within (c). The income was not to be accumulated, but was to be distributed currently, either directly to the beneficiary or for her use and benefit. It is taxable to the beneficiary.”

In *Estate of Andrew J. Igoe v. Commissioner*, 6 T. C. 639, income was credited on the books of the estate to the beneficiaries who were the residuary legatees under the decedent’s will. Although the income was not paid, it was reported by each beneficiary in his income tax return and the executors deducted the amounts so credited from the income of the estate. The petitioners contended that the entire net income of the estate was “constructively paid” to the beneficiaries as provided in Section 162(c) of the Internal Revenue Code. They agreed that the sums placed to their credit on the books of the estate were

both legally and practically available upon demand. The Tax Court, speaking through Judge Van Fossan, sustained the petitioners' contention.

We therefore submit that in view of the record in the instant case, the Tax Court clearly erred when it stated in its opinion that "The beneficiaries had no present right to the 1942 and 1943 income. They merely had a potential right thereto, which, as to the amount in dispute, was neither recognized nor enforced. The 1942 and 1943 income of the estate was not income of the estate 'to be distributed currently' as provided in Section 162(b)." (Tr. p. 152.)

We believe the Tax Court completely overlooked the provisions of Section 29.162-1 of Regulations 111, and Section 29.162-2b of the same regulations.

We can see no appreciable difference between the *Igoe* case, *supra*, and the case at bar, although the opinion of Judge Fossan in the instant case attempts to draw a distinction. The executors, by setting forth in their petitions for partial distribution that they had certain amounts of income available for distribution and petitioning for and being granted the right to distribute one-half of the income pro rata to the children who, as residuary legatees, were collectively entitled to one-half of the residue of the estate, *ipso facto* admitted that they were holding the other half of the income for the use and benefit of the widow who was the other residuary legatee.

It needs no citation of authority to the effect that executors may not discriminate in favor of one resid-

uary legatee as against another. The income was "available" to the widow on demand, and as we pointed out above, if she had petitioned the Court to distribute it to her, it would have been mandatory for the Court to have so distributed it to her. That she "acquiesced" in such action is evidenced by the fact that she included all of the income that she was entitled to receive in both her 1943 income tax return and her amended return for 1942. The income had been credited to her, it was available to her and would have been paid either if she or the executors had asked for formal permission to distribute it.

In view of the foregoing, we respectfully submit that the estate is entitled to a credit for the full amount of the distributable income for the years 1942 and 1943, and the Tax Court erred in disallowing such deductions. We will, however, set forth additional grounds which, in our opinion, entitles the estate to such credits.

RESIDUARY LEGATEES AND DEVISEES UNDER THE CALIFORNIA PROBATE LAW ARE ENTITLED TO PETITION FOR A DISTRIBUTION OF INCOME DURING THE ADMINISTRATION OF THE ESTATE.

In the preceding paragraphs we pointed out the distributions of income that had been made during the course of the administration of the estate. We now will cite the authority for distributions of income during the course of such administration.

The record in this case shows that prior to November 25, 1942, all gifts and legacies under the de-

cedent's will had been paid (Exhibits "E", "F", and "G", stipulation of facts, Tr. pp. 55-65) and that the only estate that remained undistributed was the residue.

Under the California Probate Code, Section 300, the title to a decedent's property, both real and personal, passes to the person to whom it is devised or bequeathed by his last will and testament, subject to the possession of the executor and the control of the Superior Court for the purposes of administration, sale or other disposition as provided in the Probate Code, and is chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family. (See *Noble v. Beach*, 21 Cal. (2d) 91, p. 94; *Reed v. Hayward*, 23 Cal. (2d) 336, p. 340.)

In General Counsel's Memorandum 22034-25-10297, page 3, Mr. Wenchel, the then chief counsel for the Bureau of Internal Revenue, states in part as follows:

"Advice is requested whether in the case of the estate of A, which was in process of administration during the year 1938, the income, including gains on the sale of capital assets realized and distributed by the executor in the year 1938, is taxable to the estate or to the distributees.

A died testate on April, 1938, a resident of the State of California. After providing for several specific bequests and the payment of his debts, the testator directed that the residue of the estate be divided into a specified number of equal parts and distributed to certain named persons. During the period from April, 1938 to Decem-

ber 31, 1938, the estate had a net taxable income of 17x dollars, including capital gains of 13x dollars derived from the sale of corpus of the estate. On November, 1938 the probate court ordered a payment of 55x dollars to residuary legatees, the order expressly providing that 17x dollars be paid out of income and the balance out of corpus. Payments were made by checks dated November, 1938 and on the income tax return filed for the estate a deduction was claimed for the amount of the payments from income. A's will made no provision for the distribution of income during the period of administration. Furthermore, with the exception of Section 1000 of the Probate Code of California, which permits any heir, devisee, or legatee to petition for a distribution after four months, the code of the State is silent regarding the distribution of income of an estate during administration.

Section 162(c) of the Revenue Act of 1938 provides in part as follows:

'In the case of income received by estates of deceased persons during the period of administration or settlement of the estate * * * there shall be allowed as an additional deduction in computing the net income of the estate * * * the amount of the income of the estate * * * for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heir, or beneficiary.'

In General Counsel's Memorandum 4596 (C.B. VII-2, 133 (1928) it was held (syllabus):

‘Where a will is silent as to the disposition of income received during the period of administration, the laws of the particular State involved must be considered in order to determine whether current income or gain on sales of property may be “properly” paid or credited to residuary or other legatees during any given taxable year.’

It was stated in the last paragraph of that memorandum that ‘Unless the will or the laws of the State make such payment or credit improper the amount paid or credited is deductible in computing the net income of the estate.’

Under the facts in the present case, it is the opinion of this office that the distribution directly to the beneficiaries of income, including capital gains, by the executor of the estate of A during the period of administration of the estate are deductible by the estate for Federal income tax purposes as income ‘properly paid’ under the provisions of Section 162(c) of the Revenue Act of 1938. Such income is taxable to the beneficiaries.”

In the *Estate of Bernal*, 165 Cal. 223, where one of the questions involved was the determination as to who was entitled to rents and profits during administration of a parcel of land devised to certain persons, the California Supreme Court stated, at page 235:

“What we have said not only establishes the merit of the claim of the grandchildren as to the balance remaining unpaid on the mortgage debt and interest accruing thereon, but also disposes of the claim of the son that he is entitled to a credit on account of the one thousand five hundred dollars already paid on account of the prin-

cipal of the mortgage debt. It further practically establishes as valid the claim of the grandchildren in regard to the rents and profits derived from the land. The title to the real property devised to them vested in them at the moment of the death of the testatrix, subject only to the possession of the executor for purposes of administration, including the payment of expenses of administration and debts in the order prescribed by law, in view of the provisions of the will. It was said in *Estate of Woodworth*, 31 Cal. 600: 'That is to say that the rents of the real estate accruing subsequent to the death of the testator, for the purpose of marshalling the assets, should be regarded as belonging to the realty from which they were derived. Such was the rule at common law, and no change in this respect appears to be intended.' There is nothing in our statutes, so far as we have found, that is contrary to this view. We think the discussion in *Estate of Woodworth*, 31 Cal., at pages 604 and 605, sufficiently shows that this is true. The executor holds *all* the property of the estate for purposes of administration, including not only the rents and profits of land specifically devised, but the land itself, and all of this property is subject, if necessary, to disposition for the payment of expenses and debts. But in such a case as the one before us, we must primarily resort to a certain portion of the property of the deceased for such purposes, and cannot resort to the other portion until the *primary fund for such purposes is exhausted*. And here such primary fund is that given to the residuary legatees. As between him, he being the only other person interested in the estate, and the grandchildren, the

net rents and profits of the real property specifically devised to the children, accruing since the death of deceased, are a part of such realty, and, there being sufficient other property to pay all debts and expenses in full, should have been awarded to the grandchildren. It was not, as between the son and the grandchildren, a proper application of any part thereof to pay the same on account of interest on the mortgage or on account of any expense of administration or debt of deceased.” (Italics ours.)

In the *Estate of Matthiessen*, 23 Cal. App. (2d) 608, p. 614, the Court ordered rents of property which had been collected by an executor during administration, paid to a devisee, the estate being solvent.

As we have several times pointed out, the assets of the estate, the “primary fund”, were ample to pay all indebtedness of the estate, including all unpaid taxes. Accordingly, the residuary legatees in whom the title to the residue of the estate, as well as the title to the undistributed income, was vested, could petition at any time during 1942 and 1943 to have the income distributed to them in the proportions that they took under the will and by reason thereof, such income was income to which they had a present right which was not needed in the administration of the estate. By reason thereof, Jennie B. Zellerbach was required, under the provisions of the Internal Revenue Code and the Regulations, to include one-half of the entire distributable income for each of said years in her income tax return and the estate was entitled to a deduction therefor.

This is particularly true in view of the distribution of income on December 7, 1942, corpus on December 8, 1942, and again income on December 13, 1943.

WHERE A DISTRIBUTION OF THE CORPUS OF AN ESTATE IS MADE IN ANY YEAR THAT THE ESTATE HAS DISTRIBUTABLE INCOME, THE DISTRIBUTION IS TAXABLE TO THE LEGATEE TO THE EXTENT OF THE DISTRIBUTABLE INCOME.

THE ESTATE HAVING DISTRIBUTED TO THE RESIDUARY LEGATEES CORPUS OF A VALUE IN EXCESS OF DISTRIBUTABLE INCOME, IT IS DEEMED THAT ALL INCOME WAS DISTRIBUTED TO THE LEGATEES.

An additional point urged by the appellant, as entitling it to a deduction for the year 1942 of the full amount of the income for that year, was the fact that in 1942 the executors distributed to the legatees and devisees, in addition to the income actually distributed, corpus of a value in excess of the distributable income and in 1943 corpus of the value of \$30,950.00.

Paragraphs 25, 26 and 27 of the stipulation of facts state as follows:

“(25) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on December 8, 1942, Exhibit J attached hereto, was the sum of \$1,146,000.00.” (Tr. p. 28.)

“(26) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree

for partial distribution of the Probate Court, made on July 7, 1943, Exhibit N attached hereto, was the sum of \$27,500.00.” (Tr. p. 29.)

“(27) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on August 18, 1943, Exhibit P attached hereto, was the sum of \$3,450.00.” (Tr. p. 29.)

Section 162(d)(1) of the Internal Revenue Code provides in part as follows:

“Sec. 162(d).

(d) RULES FOR APPLICATION OF SUBSECTIONS (b) AND (c)—For the purposes of subsections (b) and (c)—

(1) AMOUNTS DISTRIBUTABLE OUT OF INCOME OR CORPUS—In cases where the amounts paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid,

credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust.”

It is the appellant’s contention that, irrespective of any other factor in this case, in view of the fact that there was distributed to the residuary legatees in 1942 property of a fair market value of \$1,146,000.00 and the distributable income of said estate for said year was \$324,209.38, that the entire distributable income for the year 1942 is deductible by the estate by reason of the foregoing provisions of Section 162(d)(1) of the Internal Revenue Code.

Subsection (d) was added to Section 162 of the Internal Revenue Code by Section 111(e) of the Revenue Act of 1942. It is our contention that the foregoing provisions of subdivision (d) were enacted to cover a situation like the instant case, namely, where an estate has distributable income which, at its discretion, may be distributed or accumulated and it distributes corpus in excess of the amount of its distributable income to the persons who are entitled to such income, that it will be deemed that the entire income was distributed to the legatees entitled thereto, notwithstanding such income was not actually paid.

It is somewhat analogous to a distribution by a corporation of its capital to its stockholders which is deemed a distribution out of earnings or profits to the extent thereof. (Sec. 115(b), Internal Revenue Code.)

In General Counsel's Memorandum 24702, 1945-19-12141 (p. 9) an opinion was given with respect to whether amounts distributed by an estate out of its income during the taxable year in which the residue becomes payable are taxable to the legatee and deductible by the estate under Section 162(b) of the Internal Revenue Code, as amended by Section 111 of the Revenue Act of 1942, where such income is considered principal to the legatee under State law.

We quote from the last portion of this opinion as follows:

"The general statutory plan with respect to estates has been to tax in some way the whole net income of the estate (*Helvering v. Julia Butterworth, et al.*, 290 U. S. 365, Ct. D. 769, C. B. XIII-1, 151 (1934) (3 U.S.T.C. Sec. 1193)), that is, the income is either taxed to the estate as a separate entity or to the legatee to whom the income is paid. The basic principle underlying Section 111 of the Revenue Act of 1942 is to impose the tax, with stated limitations, upon the person who enjoys the income (the residuary legatee) and still preserve the nontaxability of pecuniary legatees with respect to estate income used to discharge lump-sum bequests. Thus, under Section 162(b) of the Code, as amended, the amounts distributed to the residuary legatee (including a trust-legatee) during the taxable year

in which the residue becomes payable, to the extent the estate has income for such taxable year, would represent income to the residuary legatee.

Senate Report No. 1631, Seventy-seventh Congress, second session (C. B. 1942-2, 504, at page 559), states in part as follows:

‘Your Committee bill adds an amendment to Section 162(b) of the Code designed to include in the income of a legatee or beneficiary the income of the estate or trust for its taxable year which, within such taxable year, becomes payable to the legatee or beneficiary, even though it then becomes payable as part of an accumulation of income held until the happening of some event which occurs within the taxable year. Such cases are usually cases where accumulated income of an estate is paid to a residuary legatee upon termination of the estate or where income of a trust is accumulated for distribution upon the beneficiary’s reaching a specified age.’

Although it is not expressly stated that the provisions of Section 162(b) of the Code, as amended, should be applied without regard to State law, it is inferred that such was the Congressional intent, for it seems clear that Congress intended to change the rule laid down in the *Durkheimer* case, *supra*, and in similar cases, so that the amount paid to the residuary legatee would be taxable to the legatee to the extent that the estate had income for the taxable year in which the residue became payable, irrespective of the fact that under the law of most States such income would be considered an addition of principal to the residue. (See Section 29.162.2(b) of Regulations 111.)

Accordingly, it is the opinion of this office that amounts distributed by an estate out of its income during the taxable year in which the residue becomes payable are, to the extent the estate had income (other than income in respect of a decedent) for such taxable year, taxable to the legatee and deductible by the estate under Section 162(b) of the Internal Revenue Code, as amended by Section 111 of the Revenue Act of 1942, regardless of the fact that under State law such income is considered principal to the legatee, except where the distribution is made in satisfaction or payment of a pecuniary legacy. (See *Old Colony Trust Co. et al. v. Commissioner*, 38 B. T. A. 828 (CCH Dec. 10, 458), and *Arthur H. Wellman v. Welch*, 99 Fed. (2d) 75 (38-2 U.S.T.C. Sec. 9508), with respect to the exception.) Signed by J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.)”

In *Almira A. Wick v. Commissioner* (Memorandum Decision) Docket No. 109506, entered January 15, 1943; 1 Tax Court Memorandum Decisions 434, the Tax Court held that amounts paid a legatee before final distribution where the executors had discretion whether to distribute income or accumulate the income was a distribution of income within the intentment of Section 162(c) of the Revenue Act of 1938 (now Internal Revenue Code) even though the same was marked as on account distribution and the source of the funds came from an account in which both corpus and income were commingled.

If appellant's contention as above set forth is not correct, it would be comparatively simple to dis-

tribute corpus to the legatees, keep the income in the estate, and thus avoid distributing the income to the legatees, which in many instances may be most desirable. This was the practice before 1942 and why we contend that the 1942 amendment was designed to correct this evil. Finally, in connection with this subject matter we quote in part Section 29.162-2(a) of the Regulations:

“The method of allocating income of the estate or trust for its taxable year in cases to which section 162(d)(1) applies is as follows: The aggregate of all amounts which can be paid, credited, or distributed out of other than income (except under a gift, bequest, devise, or inheritance not to be paid, credited, or to be distributed at intervals) is obtained. The aggregate of such amounts is considered to be paid, credited, or distributed in such cases out of income of the estate or trust for its taxable year if it does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts does exceed the distributable income of the estate or trust for its taxable year, the portion of such amount paid, credited, or to be distributed to a legatee or beneficiary is considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of all distributable income as the amount so paid, credited, or to be distributed to the legatee or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to such legatees or beneficiaries for the taxable year of the estate or trust. The propor-

tion stated in the preceding sentence applies only to legatees or beneficiaries of amounts which can be paid, credited, or distributed out of other than income of the estate or trust and, in computing such proportion, the amount of any gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals is not to be included.”

The Tax Court held that Section 162(d) of the Internal Revenue Code did not apply because “the bequest and devise of the residuary estate herein is a bequest and devise ‘not to be paid, credited or distributed at intervals’ ”.

While the decedent’s will did not provide that bequests and devisees were to be paid at intervals, the California Probate Code, in effect, made them payable at intervals because Section 1000 of the Probate Code providing for partial distribution after four months and Section 1010 providing for ratable distribution when the time for filing or presenting claims has expired (six months) are, to all intents and purposes, written into the will.

The Tax Court in discussing Section 162(d) of the Internal Revenue Code quotes from a portion of the report of the Ways and Means Committee of the Seventy-seventh Congress, Second Session. This quotation appears at page 156 of the Transcript of Record and reads as follows:

“As a complement to the amendment of section 22(b)(3) and for purposes of clarity, section 162 of the Code is also amended by adding a new sub-

section designated as '(d)'. This subsection provides a formula for allocating income of an estate or trust to legatees and beneficiaries in order to make the source of distribution clear and to prevent tax avoidance by distributions claimed to be other than out of income or out of income other than income for the current taxable year. It is immaterial under the rule stated in section 162(d) whether income is used to make the distribution, whether such distribution may, in the discretion of the fiduciary, be made out of other than income, or whether the terms of the will or trust instrument direct that amounts other than income be used to assure the beneficiary the payment of a specified sum at stated intervals. * * *"

The Tax Court also refers to Section 29.162-2 of Regulation 111 which deals with Section 162(d)(1) and which we have quoted above.

We submit that the foregoing quotation from the Ways and Means Committee Report and the Regulations referred to directly supports the appellant's contention and that the Tax Court erred when it stated:

"From the foregoing it is obvious that amounts paid out of corpus on a bequest and devise as herein involved are not within the purpose and scope of subsection (d)."

And also erred when it stated:

"Since the bequest and devise of the residuary estate herein is a bequest and devise 'not to be paid, credited or distributed at intervals', subsection (d) of section 162 is not applicable."

For the foregoing additional reasons we contend, and respectfully submit, that the estate having distributed corpus in 1942 and 1943 to the extent that it had distributable income, it will be deemed a distribution of income.

THE ORDINARY DUTIES PERTAINING TO THE ADMINISTRATION OF THE DECEDENT'S ESTATE HAD BEEN COMPLETED, AND ACCORDINGLY IT IS DEEMED THAT THE ESTATE HAS BEEN DISTRIBUTED AND THE INCOME TAXABLE TO THE LEGATEES.

We have heretofore shown that in both 1942 and 1943 the estate was in such condition that at the election of the executors the entire estate could have been distributed and wound up. There were sufficient assets on hand to discharge all the obligations of the estate. The only matter that remained uncompleted was the determination, if any, of a deficiency in federal estate taxes arising out of a dispute between the executors and the Treasury Department as to the valuations of certain stocks in the estate under the so-called "blockage rule". The maximum amount of such liability was known. This was all that remained to be done in the estate and the estate could have been distributed to the legatees subject to the payment of any deficiency in federal estate taxes or the executors could have reserved a sufficient amount to cover the maximum liability therefor. (*Estate of Johnson*, 218 Cal. 501, p. 504.)

The indebtedness to the Wells Fargo Bank & Union Trust Co. was amply secured and could have been discharged, as the executors had in their possession sufficient assets for this purpose, which is likewise true with respect to the indebtedness to Jennie B. Zellerbach, one-half of which, as a matter of fact, was owned by her.

Section 29.162-1(c) of the Regulations provides in part as follows:

“The income of an estate of a deceased person, as dealt with in the Internal Revenue Code, is therein described as received by the estate during the period of administration or settlement thereof. The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for settlement of estates. If an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time the duties of administration are complete and he actually assumes his duties as trustee whether pursuant to an order of court or not.”

Under the foregoing provisions of the Regulations, we submit that the Commissioner could have determined that the administration of the estate had been completed for all intents and purposes in 1942, and that the distributable income for said year was in

fact the income of the residuary legatees, even though not paid to them in full. Under such circumstances, the estate would be entitled to a credit for the full amount of the distributable income for 1942 and 1943.

CONCLUSION.

In conclusion, and by way of summary, the taxpayer respectfully submits that the evidence in this case clearly sets forth that the entire income of the estate of the decedent taxpayer, the appellant herein, for the years 1942 and 1943 should be deemed as having been distributed in full to all the residuary legatees of the estate in the proportions which they take under the decedent's will; that the estate is entitled to a credit for all of such income, the same having been included in the respective income tax returns of the residuary legatees for each of said years; that the Tax Court erred in holding said legatees (beneficiaries) had no present right to the 1942 and 1943 income of the appellant; that it further erred in holding that the appellant was not entitled to any deduction for the years 1942 and 1943 under Section 162(c) of the Internal Revenue Code in addition to the amounts actually distributed out of income; that the Tax Court further erred in holding that the provisions of Section 162(d)-(1) of the Internal Revenue Code was not applicable.

Finally, the appellant contends, and respectfully submits, that the decision of the United States Tax Court should be reversed; that the determination that

there were deficiencies in the income taxes for the years 1942 and 1943 in the respective amounts of \$1,768.55 and \$67,388.46 was erroneous and should be reversed and in lieu thereof it should be determined that the appellant is entitled to a refund for the year 1942 in the amount of \$71,585.08 and that there is no income tax due from the appellant for the year 1943.

Dated, San Francisco,
March 15, 1948.

Respectfully submitted,
PHILIP S. EHRLICH,
ALBERT A. AXELROD,
Attorneys for Appellant.

No. 11,795

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

ESTATE OF ISADORE ZELLERBACH, DECEASED, J. DAVID
ZELLERBACH AND HAROLD L. ZELLERBACH, EXECUTORS,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

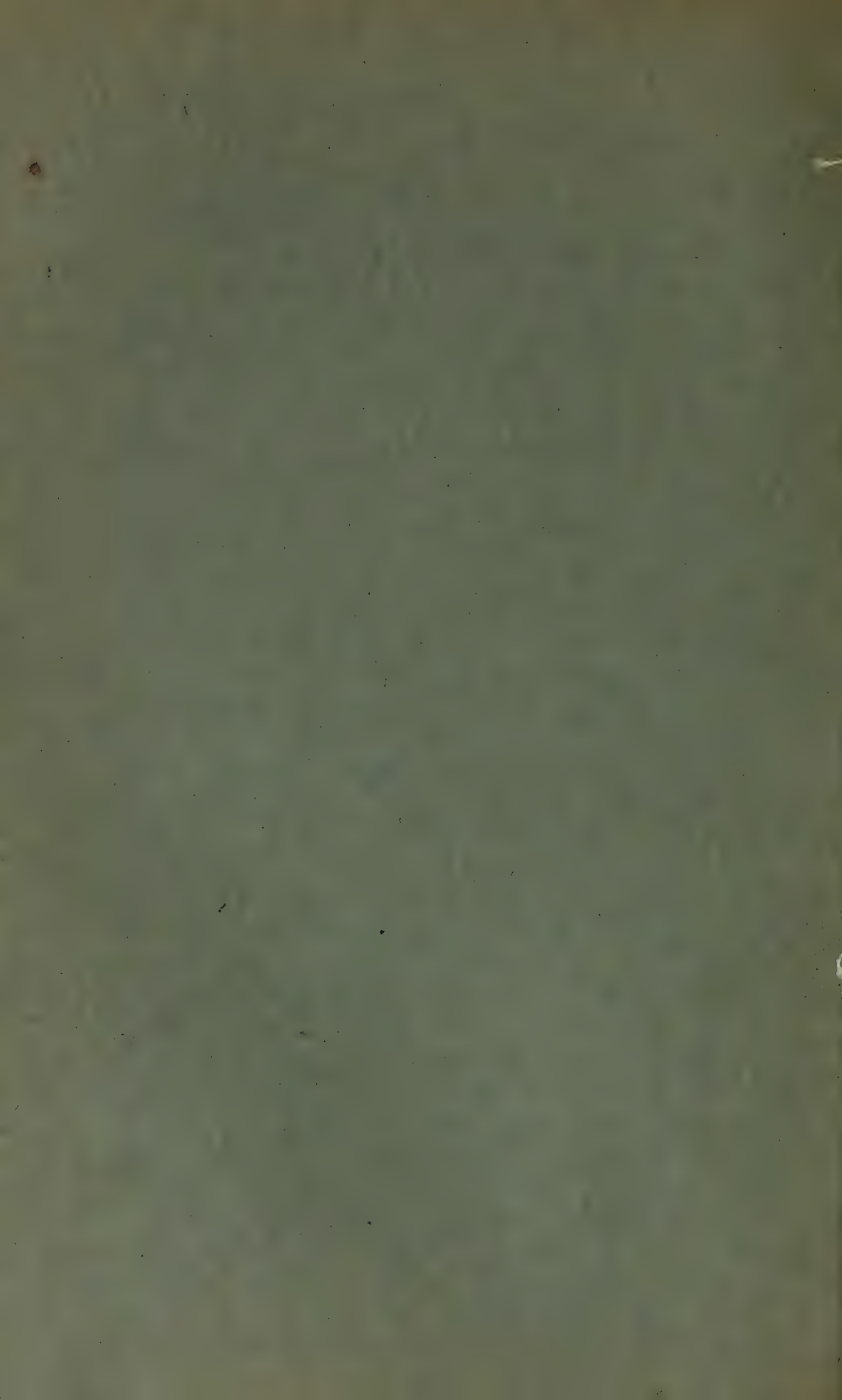
THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,
GEORGE A. STINSON,
HELEN GOODNER,

Special Assistants to the Attorney General.

FILED

APR 2 1940



INDEX

| | Page |
|---|------|
| Opinion below..... | 1 |
| Jurisdiction..... | 1 |
| Question presented..... | 2 |
| Statutes and regulations involved..... | 2 |
| Statement..... | 3 |
| Summary of argument..... | 9 |
| Argument: | |
| The taxpayer is entitled to deduct only the income distributed by it in 1942 and 1943..... | 10 |
| A. Section 162 (b)..... | 11 |
| B. Section 162 (c)..... | 20 |
| C. Section 162 (d) (1)..... | 23 |
| Conclusion..... | 28 |
| Appendix..... | 29 |

CITATIONS

Cases:

| | |
|---|--------|
| <i>Anderson's Estate v. Commissioner</i> , 126 F. 2d 46, certiorari denied, 317 U. S. 653..... | 13, 27 |
| <i>Bates v. Howard</i> , 105 Cal. 173..... | 14 |
| <i>Burnet v. Whitehouse</i> , 283 U. S. 148..... | 25 |
| <i>Carlisle v. Commissioner</i> , 165 F. 2d 645..... | 13, 26 |
| <i>Chick v. Commissioner</i> , decided February 27, 1948..... | 23 |
| <i>Cohen, Estate of v. Commissioner</i> , 8 T. C. 784..... | 17 |
| <i>Commissioner v. Bishop Trust Co.</i> , 136 F. 2d 390..... | 13 |
| <i>Commissioner v. First Trust & D. Co.</i> , 118 F. 2d 449..... | 13, 17 |
| <i>Commissioner v. Stearns</i> , 65 F. 2d 371, certiorari denied, 290 U. S. 670..... | 13, 21 |
| <i>Dabney v. Dabney</i> , 54 Cal. App. 2d 695..... | 14 |
| <i>Dam, Estate of</i> , 126 Cal. App. 70..... | 16 |
| <i>Dunlop v. Commissioner</i> , 165 F. 2d 284..... | 15 |
| <i>Dutard, Estate of</i> , 147 Cal. 253..... | 16 |
| <i>Frank's Trust of 1931 v. Commissioner</i> , 165 F. 2d 992..... | 21, 22 |
| <i>Frederich v. Commissioner</i> , 145 F. 2d 796..... | 23 |
| <i>Freuler v. Helvering</i> , 291 U. S. 35..... | 11, 13 |
| <i>Helvering v. Butterworth</i> , 290 U. S. 365..... | 11 |
| <i>Helvering v. Pardee</i> , 290 U. S. 365..... | 25 |
| <i>Hill, Estate of</i> , 94 Cal. App. 113..... | 16 |
| <i>Igoe, Estate of v. Commissioner</i> , 6 T. C. 639..... | 17, 22 |
| <i>Lilienkamp v. Superior Court</i> , 14 Cal. 2d 293..... | 16 |
| <i>Lynchburg Trust & S. Bank v. Commissioner</i> , 68 F. 2d 356, certiorari denied, 292 U. S. 640..... | 21 |

| Cases—Continued | Page |
|--|--------|
| <i>Murphy v. Farmers' etc. Bank</i> , 131 Cal. 115..... | 14 |
| <i>Painter, In re</i> , 115 Cal. 635..... | 17 |
| <i>Palm, Estate of</i> , 68 Cal. App. 2d 204..... | 14 |
| <i>Plimpton v. Commissioner</i> , 135 F. 2d 482..... | 13, 18 |
| <i>Stephenson, Estate of</i> , 65 Cal. App. 2d 120..... | 16 |
| Statutes: | |
| California Probate Code (Deering's California Codes, Annotated, 1944): | |
| Sec. 300..... | 29 |
| Sec. 956..... | 29 |
| Sec. 1000..... | 29 |
| Sec. 1001..... | 30 |
| Sec. 1010..... | 31 |
| Sec. 1011..... | 32 |
| Sec. 1021..... | 32 |
| Sec. 1200..... | 32 |
| Internal Revenue Code: | |
| Sec. 22 (26 U. S. C. 1940 ed., Sec. 22)..... | 25 |
| Sec. 161 (26 U. S. C. 1940 ed., Sec. 161)..... | 33 |
| Sec. 162 (26 U. S. C. 1940 ed., Sec. 162)..... | 34 |
| Revenue Act of 1942, c. 619, 56 Stat. 798 (26 U. S. C. 1940 ed., Supp. V, Secs. 22, 111, 162), Sec. 111..... | 12, 24 |
| Miscellaneous: | |
| G. C. M. 22034, 1940-1 Cum. Bull. 90..... | 15 |
| G. C. M. 24702, 1945 Cum. Bull. 241..... | 26 |
| H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 66-68 (1942-2 Cum. Bull. 372)..... | 25 |
| S. Rep. No. 1631, 77th Cong., 2d Sess. (1942-2 Cum. Bull. 504): | |
| P. 70..... | 25 |
| Pp. 71-72..... | 12, 24 |
| Treasury Regulations 111: | |
| Sec. 29.162-1..... | 36 |
| Sec. 29.162-2..... | 37 |

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,795

ESTATE OF ISADORE ZELLERBACH, DECEASED, J. DAVID
ZELLERBACH AND HAROLD L. ZELLERBACH, EXECUTORS,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 136-157) are reported at 9 T. C. 89.

JURISDICTION

This appeal involves income taxes for the years 1942 and 1943 in the respective amounts of \$1,768.55 and \$67,388.46. (R. 165.) Income tax returns for these years were filed for the taxpayer estate with the Collector of Internal Revenue at San Francisco, California. (R. 137.) On September 20, 1945, the Commissioner of Internal Revenue mailed a notice of deficiency to the taxpayer, advising it of deficiencies in

income tax for 1942 and 1943 in a total amount of \$66,944.62. (R. 4, 10-17.) Within ninety days thereafter, on December 12, 1945 (R. 2), the taxpayer filed a petition with the Tax Court of the United States for a redetermination of the deficiencies under Section 272 of the Internal Revenue Code (R. 4-17). By amended answer (R. 20-22) the Commissioner made claim for increases in the deficiencies previously determined for 1942 and 1943 in the respective amounts of \$596.83 and \$1,652.27 pursuant to Section 274 (e) of the Internal Revenue Code. The decision of the Tax Court, finding deficiencies in income tax for the years 1942 and 1943 in the respective amounts of \$1,768.55 and \$67,388.46, was entered on September 16, 1947. (R. 165.) The case is brought to this Court by a petition for review filed by the taxpayer on October 14, 1947 (R. 3, 166-175), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether, in determining its taxable net income for 1942 and 1943, the taxpayer estate is entitled, under Section 162 (b), (c), or (d) (1) of the Internal Revenue Code, to deduct, in addition to the income distributed to legatees under the decedent's will, all of the remaining income in each year, although such income was not distributed, was not to be distributed currently, and was not credited, to the legatees in those years.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*.

STATEMENT

The facts found by the Tax Court (R. 137-145) may be summarized as follows:

On September 2, 1941, the will of Isadore Zellerbach, who died August 7, 1941, was admitted to probate by the Superior Court of California in and for the City and County of San Francisco. Under the will, after bequests of \$5,000 to each of his eight grandchildren, all the rest, residue and remainder of testator's estate was given, devised and bequeathed as follows: An undivided three-sixths thereof to his widow, Jennie B. Zellerbach, and an undivided one-sixth to each of his three children, J. David, Harold L., and Claire. The executors were given full, absolute, and complete power and authority to sell, mortgage, pledge, exchange or otherwise dispose of or deal with the whole or any portion of the estate according to their judgment and discretion and without any court order. The will made no provision for the distribution of the income received by the estate during the period of administration. (R. 137-138.)

On November 25, 1942, the executors filed with the Probate Court a petition for the distribution of \$181,000 from the income of the estate of approximately \$317,000 received during the year 1942 as follows: \$22,000 to the widow and \$53,000 to each of the three children. The petition stated in part that the total value of the estate as shown by the inventory and appraisement was \$4,754,-671.56, and that "it is not proposed at this time to distribute any of the corpus of the residue of the estate, nor any income, save and except that hereinabove described." (R. 138-139.)

After hearing, the Probate Court entered an order dated December 7, 1942, in which it found as follows (R. 139):

* * * that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to the said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration; * * *

The order authorized payment "from the income of said estate, for the calendar year 1942, the total sum of \$181,000," payable \$22,000 to the widow and \$53,000 to each of the three children of decedent. (R. 139.)

The distribution of \$181,000 was paid \$180,297.85 out of income and \$702.15 out of corpus. (R. 139.)

On November 25, 1942, the executors filed another petition with the Probate Court praying for authority to distribute from the corpus of the estate certain shares of stock of Crown Zellerbach Corporation and of Rayonier Incorporated, one-half thereof to the widow and one-sixth to each of the three children of decedent. After hearing, the Probate Court entered an order dated December 8, 1942, authorizing

the executors to make distribution of the stock as prayed for. The fair market value of the stock at the time of its distribution was \$1,146,000. (R. 140.)

On December 31, 1942, all the distributions authorized by the Probate Court during the year 1942 had been made. (R. 140.)

An income tax return for the year 1942 was filed for the estate, showing income of \$322,756.33, from which was deducted \$181,000 as the amount distributable to beneficiaries, leaving a net income (taxable to fiduciary) of \$141,756.33, and disclosing a tax liability of \$97,606.47. On December 14, 1943, an amended income tax return was filed for the year 1942 showing income of \$322,756.33, from which was deducted \$315,323.74 as the amount distributable to beneficiaries, leaving a net income (taxable to fiduciary) of \$7,432.59 and disclosing a tax liability of \$1,619.78. (R. 140.)

The total net income of the estate for 1942, before any allowance for income distributed to beneficiaries during the year, was \$324,209.38, which sum is composed of ordinary income in the amount of \$316,595.74 and capital gains in the amount of \$7,613.64. (R. 141.)

On their original income tax returns for 1942 the widow reported \$22,000, and each of the three children reported \$53,000, as distributable income from the estate. On January 24, 1944, the widow filed an amended income tax return in which she reported as having been distributed to her the amount of \$157,661.87, representing one-half of all of the income of the estate for the year 1942. (R. 141.)

Pursuant to a petition of the executors filed June 18, 1943, the Probate Court, on July 7, 1943, entered an order authorizing the executors to make a partial distribution of the assets of the estate, consisting of a parcel of unimproved real property in San Francisco, three-sixths to the widow and one-sixth to each of the three children. The fair market value of the property at the time of distribution was \$27,500. (R. 141.)

Pursuant to a petition of the executors filed August 4, 1943, the Probate Court on August 18, 1943, entered an order authorizing the executors to make a partial distribution of the assets of the estate, consisting of shares of stock of Dreamland Auditorium, Ltd., three-sixths to the widow and one-sixth to each of the three children. The fair market value of the shares at the time of distribution was \$3,450. (R. 141-142.)

On November 30, 1943, the executors filed a petition with the Probate Court for authorization to make a partial distribution consisting of \$96,000, of which \$32,000 was to be distributed to each of the three children of decedent. In the petition it was stated that the income for 1943 would approximate \$191,500; that the executors desired to distribute \$96,000 thereof; and that it was not proposed to distribute any of the corpus of the residue of the estate, nor any income save and except the \$96,000. No portion of the income was requested to be distributed to the widow. On December 13, 1943, the Probate Court entered an order authorizing the income distribution of \$96,000, as prayed for. The distribution

of \$96,000 was paid \$94,164.15 out of income and \$1,835.85 out of corpus. (R. 142.)

The income tax return filed for the estate for 1943 showed income tax income of \$203,895.74 and victory tax income of \$200,811.46, from each of which \$185,328.30 was deducted as the amount distributable to beneficiaries, leaving an income tax net income of \$18,567.44 and a victory tax net income of \$15,483.16. The total income and victory tax liability shown by the return was \$6,712.28. The return contained a schedule allocating \$92,664.15 of the distributable amount of \$185,328.30 to the widow, and \$30,888.05 to each of the three children. (R. 142-143.)

The widow included in her federal income tax return for 1943, as income received by her from the estate, the sum of \$92,664.15. (R. 143.)

The total net income of the estate for 1943, before any allowance for income distributed to beneficiaries during that year, was \$206,864.94, which sum was composed of ordinary income of \$188,328.30 and capital gain of \$18,536.64. (R. 143.)

On petition filed October 26, 1942, the Probate Court, on November 6, 1942, made an order authorizing the executors to borrow a sum not to exceed \$1,000,000, to execute their promissory note or notes payable on or before one year after date with interest at $2\frac{1}{2}$ per cent per annum, and as security therefor to pledge all or any portion of the personal property of the estate remaining in the hands of the executors. Pursuant to such authorization the executors, on November 6, 1942, borrowed from Wells Fargo Bank & Trust Company the sum of \$500,000, pledging as col-

lateral 9,000 shares of the preferred stock of Crown Zellerbach Corporation of the market value at that time of approximately \$720,000. They also borrowed the sum of \$318,669.31 from the widow. On January 15, 1943, a payment of \$100,000 was made, reducing the principal of the bank loan to \$400,000. On August 4, 1943, and on December 6, 1943, additional amounts of \$50,000 and \$75,000 were borrowed, increasing the principal of the loan to \$525,000. The entire loan was paid on March 13, 1944. (R. 143-144.)

The federal estate tax, as disclosed by the return filed, had been paid at December 31, 1943. The Commissioner subsequently determined that the estate was liable for a deficiency in federal estate taxes, which controversy was finally settled in November, 1946. (R. 144.)

On December 31, 1942, the estate had assets of the then value of \$3,425,092.17 and liabilities of \$1,490,565.49, or an excess of assets over liabilities of \$1,934,526.68. This was after the distribution of the amount of \$181,000 and the distribution of corpus of \$1,146,000, and after giving effect to all liabilities which were subsequently determined to be due. (R. 144.)

On December 31, 1943, the assets of the estate had a value of \$3,942,739.89, and the liabilities amounted to \$1,104,886.70, or an excess of assets over liabilities of \$2,837,853.19. (R. 145.)

On these facts the Tax Court held that in determining its taxable net income for 1942 and 1943 the taxpayer estate is entitled to deduct only \$180,297.85 in 1942 and \$94,164.15 in 1943, representing the

amounts of income actually distributed to the residuary legatees in those years. (R. 157.)

SUMMARY OF ARGUMENT

(A) The taxpayer estate is not entitled to deduct its undistributed income for the years 1942 and 1943 under Section 162 (b) of the Internal Revenue Code, because the undistributed income was not currently distributable. The will did not direct distribution of the income currently and under California law the legatees had no present right in 1942 and 1943 to a current distribution of the income, since no orders for distribution were entered in those years. Although the legatees had the right to petition the Probate Court for distribution of the income and, if the statutory procedure for notice and hearing was complied with and if the facts required by the California statutes were made to appear at the hearing, to have orders made in their favor, nevertheless, the entry of orders for distribution was not available as a matter of right but depended on the precedent statutory steps. These steps were not taken in 1942 and 1943. It follows that the undistributed income was not currently distributable in those years.

(B) The undistributed income for 1942 and 1943 may not be deducted by the taxpayer under Section 162 (c) of the Code, because it was not properly credited in those years to the legatees entitled to receive it under the testator's will. There is no evidence that the unpaid income was made unconditionally available to the legatees in 1942 and 1943, and thus there was no credit, as the term is used in the statute.

Nor is the undistributed income to be considered as the income in fact of the legatees on the theory that the period of administration had in fact ended in 1942 and 1943. The estate had large amounts of unpaid liabilities, administration had not been unduly delayed, and the estate was still in process of administration under California law.

(C) The distributions of corpus made in the years 1942 and 1943 are not, under Section 162 (d) (1) of the Code, to be treated as distributions of income to the extent of the undistributed income, and thus deductible under Section 162 (c). Section 162 (d) (1) in terms applies only to gifts, bequests, and inheritances which are to be paid, credited, or distributed at intervals. The bequest of the residuary estate in this case was not, under the will, payable at intervals, but was a lump sum legacy of the entire residue, and thus outside the scope of Section 162 (d) (1). The mere fact that partial distributions were made upon court order from time to time does not convert the bequest into one which was to be paid, credited, or distributed at intervals.

ARGUMENT

The taxpayer is entitled to deduct only the income distributed by it in 1942 and 1943

The net income of an estate during the period of administration or settlement is liable for the same income taxes as are imposed on individuals and the taxes are to be paid by the fiduciary under Section 161 of the Internal Revenue Code (Appendix, *infra*). The net income of the estate is computed on the same basis

as the net income of an individual, except that, as provided in Section 162 of the Internal Revenue Code, certain additional deductions are allowed to the estate.

The only question in this case is whether the taxpayer estate is entitled under Section 162 (b), (c), or (d) (1) of the Code (Appendix, *infra*) to deduct in 1942 and 1943, for purposes of determining its taxable net income, its entire income for each year, as it contends, or whether, as the Tax Court held, the taxpayer is permitted by these subsections to deduct only the amounts of income actually distributed to the residuary legatees in 1942 and 1943. The following discussion will show that the Tax Court correctly held that Section 162 (b), (c), and (d) (1) does not authorize deduction by the taxpayer of any income in excess of the amounts distributed in the taxable years.

At the outset it is observed that the general purpose underlying Section 162 is to tax, either to the fiduciary, the beneficiaries, or partly to each, all of the net income of estates or trusts for each year. If none of the net income is paid, credited, or is currently distributable to the beneficiaries, the net income without further deduction is taxable to the fiduciary. But he is allowed credit for any amount, paid, credited, or currently distributable, to a beneficiary within that year, and this amount then becomes taxable income of the beneficiary. *Helvering v. Butterworth*, 290 U. S. 365; *Freuler v. Helvering*, 291 U. S. 35, 41-42.

A. Section 162 (b)

Under Section 162 (b) the income of the estate for its taxable year "which is to be distributed currently

by the fiduciary to the legatees” may be deducted, but the amount allowed as a deduction must be included in the income of the ~~beneficiaries~~ for that year, whether distributed to them or not. The term “income which is to be distributed currently” includes income for the taxable year of the estate which “becomes payable” to the legatees within the year.¹ Thus, the estate may deduct, under this subsection, all of its income in 1942 and 1943, as it contends, only if the income was to be distributed currently or become payable within those years.

The testator’s will itself contained no provision directing that the income received by the estate during the period of administration was to be distributed currently to the legatees named by him. (R. 138.) On the contrary, the will implies that distribution of the income was to be discretionary with the executors, since they were given complete power to deal with the estate or any part according to their judgment and discretion and without court order. (R. 138.) Consequently, the legatees had no present enforceable right to receive the income in 1942 and 1943 under

¹ This provision was added by Section 111 (b) of the Revenue Act of 1942 to the existing statute and was explained in S. Rep. No. 1631, 77th Cong., 2d Sess., p. 71-72 (1942-2 Cum. Bull. 504, 559-560), as follows:

“Your committee bill adds an amendment to section 162 (b) of the Code designed to include in the income of a legatee or beneficiary the income of the estate or trust for its taxable year which, within such taxable year, becomes payable to the legatee or beneficiary, even though it then becomes payable as part of an accumulation of income held until the happening of some event which occurs within the taxable year. Such cases are usually cases where accumulated income of an estate is paid to a residuary legatee upon termination of the estate or where income of a trust

the terms of the will, and to bring the case within Section 162 (b), it must appear that they had a *recognized present right* in those years under the local law to obtain the income or compel its distribution. See Section 29.162-2 (b) of Treasury Regulations 111 (Appendix, *infra*). Cf. *Freuler v. Helvering*, 291 U. S. 35, 42. As was stated in *Plimpton v. Commissioner*, 135 F. 2d 482, 485-486 (C. C. A. 1st):

* * * The scheme of the statute is to allow deductions to a fiduciary as to income which he is under *an absolute obligation to pay* to a beneficiary, whether he has in fact done so or not, and to tax such income to the beneficiary; but, by a similar technique of deduction, not to tax income to a beneficiary *which he is not entitled to receive as of right* until such income has been actually *received*. * * * [Italics supplied].

See also *Commissioner v. Stearns*, 65 F. 2d 371, 373 (C. C. A. 2d), certiorari denied, 290 U. S. 670; *Commissioner v. First Trust & D. Co.*, 118 F. 2d 449, 452 (C. C. A. 2d).

is accumulated for distribution upon the beneficiary's reaching a specified age.

"The question of whether the income of an estate or trust for the taxable year in which it becomes payable as part of an accumulation is taxable on the one hand to the estate or trust or on the other hand to the legatee or beneficiary has been a source of litigation in certain cases under existing law. This amendment is designed to clarify the law. * * *)"

The provision was discussed and construed in *Carlisle v. Commissioner*, 165 F. 2d 645 (C. C. A. 6th). Cf. *Anderson's Estate v. Commissioner*, 126 F. 2d 46 (C. C. A. 9th), certiorari denied, 317 U. S. 653, and *Commissioner v. Bishop Trust Co.*, 136 F. 2d 390 (C. C. A. 9th).

The Tax Court held here that under California law, the legatees had no present right in 1942 and 1943 to the income of those years, but merely a potential right which, as to the amounts not distributed, was neither recognized nor enforced in those years. (R. 152.) This holding is plainly correct.

While under Section 300 of the California Probate Code (Appendix, *infra*) title to a decedent's property passes at death to his devisees and legatees, under the express terms of the section, all the property remains in the possession of the executor, under the control of the superior court for purposes of administration, and is subject to payment of the decedent's debts and expenses of administration. See *Murphy v. Farmers' etc. Bank*, 131 Cal. 115, 119, and *Dabney v. Dabney*, 54 Cal. App. 2d 695, 699. The executor is under control of the court in handling the property and derives his authority to act from orders of the court. *Estate of Palm*, 68 Cal. App. 2d 204, 212. A decree of distribution serves to release the property from the administration to which it was subject and to transfer possession of the property to the legatees. *Bates v. Howard*, 105 Cal. 173, 183. Cf. also Section 1021 of the Probate Code (Appendix, *infra*), which permits the persons named in a decree of final distribution to recover their respective shares from the executor on the basis of the order which is conclusive when final.

The mere fact that legal title to what will be the residuary estate after administration is concluded vested in the legatees in this case is not determinative,

contrary to taxpayer's argument² (Br. 29-35), where their title is contingent upon an order of distribution. See *Dunlop v. Commissioner*, 165 F. 2d 284, 287 (C. C. A. 8th). The question under Section 162 (b) is whether or not the legatees were entitled as a matter of right to take possession of the income in the years in which it was received, because it was to be distributed currently to them. As already shown, Section 300 denies this right to them until the superior court has ordered distribution. Cf. also Section 1021 of the Probate Code. It remains to consider the procedure for distribution.

Section 1000 of the California Probate Code (Appendix, *infra*) authorizes the executor or the legatee (at any time after the lapse of four months from the issuance of letters testamentary) to petition the court for a distribution of any part of the estate. Upon filing, the petition must be set for hearing by the court and notice of the petition must be given as provided in Section 1200 of the Probate Code (Appendix, *infra*), that is, by posting the notice at the courthouse at least ten days before the day of hearing and by mailing notice to the executors or administrator (when they are not the petitioners), and to all persons who have requested notice or who have given notice of appearance in the estate. The jurisdiction of the court

² G. C. M. 22034, 1940-1 Cum. Bull. 90, quoted by taxpayer in this connection (Br. 30-32), involved a set of facts in which all of the income for the year was actually distributed during the year pursuant to court order. The income was held to be "properly paid" to the beneficiaries within Section 162 (c). The ruling is inapplicable in the present case, which involves only the status of *undistributed* income.

to hear the petition and to order distribution depends on the giving of notice as prescribed by statute. *Estate of Dam*, 126 Cal. App. 70, 73–76; *Lilienkamp v. Superior Court*, 14 Cal. 2d 293, 298, 301. Any interested person is entitled under Section 1000 to appear and resist the application for distribution. *Dabney v. Dabney*, *supra*, p. 701. Section 1001 (Appendix, *infra*) provides, that if, *at the hearing*, it appears that the estate is “but little indebted,” that all inheritance taxes have been paid or that the designated state official has consented in writing to the distribution, and that the part of the estate sought in the petition to be distributed may be distributed without loss to the creditors, or injury to the estate or any interested person, then the court “shall make an order” of distribution, subject to such bond as the court may designate.³

These statutes require the determination of issues of fact (*Estate of Hill*, 94 Cal. App. 113, 115), the statutory facts must be established by the court’s findings (cf. *Estate of Dutard*, 147 Cal. 253, 255) and only if the prescribed conditions have been shown to exist, is an order for partial distribution mandatory (*Estate of Stephenson*, 65 Cal. App. 2d 120, 123). As the probate judge in charge of the taxpayer estate testified in this case (R. 122), the granting of a peti-

³ Cf. Sections 1010 and 1011 of the California Probate Code (Appendix, *infra*) authorizing the filing of a petition for a ratable distribution, after the time for filing claims has expired and all uncontested claims have been paid or secured but the estate cannot be closed finally, and directing, after similar notice, hearing, and the finding of the same facts as are required by Section 1001, the entry of an order for a ratable distribution.

tion for partial distribution entails the exercise of judgment and discretion, and it was so held in *In re Painter*, 115 Cal. 635, 640.

Under the California statutes, therefore, the residuary legatees in this case were not entitled to an order for the current distribution of the income of the estate to them as a matter of right. They had a right to petition for a distribution in 1942 and 1943, but until a petition was filed, notice was given, a hearing was held, and the facts set out in the statute were proved at the hearing, the legatees had no present right whatever to an order of distribution. None of the things fixed by the statutes as prerequisite conditions to the court's jurisdiction or obligation to enter orders of distribution were done in this case as to the income in excess of \$181,000 in 1942 and \$96,000 in 1943. Because, as previously shown, the right to distribution depended upon an order for distribution by the court, and because no orders were made or were obtainable as a matter of right, it necessarily follows that the undistributed income in 1942 and 1943 was not currently distributable in those years by virtue of California law within the meaning of Section 162 (b). See *Estate of Cohen v. Commissioner*, 8 T. C. 784, 786; *Estate of Igoe v. Commissioner*, 6 T. C. 639, 645-646. See also *Commissioner v. First Trust & D. Co.*, 118 F. 2d 449, 452 (C. C. A. 2d), where the court pointed out that income was not currently distributable within the meaning of Section 162 (b), since the instrument did not impose a duty on the fiduciary to make periodic distributions of current income and since the beneficiaries under state law could compel the

distribution of income or principal to them *only after an accounting* by the fiduciary *and decree* rendered thereon.

Administrative considerations lend weight to the view that Congress intended to establish as the test of whether or not income was to be distributed currently within the meaning of Section 162 (b) the absolute right under state law to a distribution, rather than the mere right to petition for an order of distribution, and to have such order if the necessary facts should be established to the satisfaction of the court. If the latter were the test, the Commissioner in order to determine whether Section 162 (b) applied, would in each case be required to inquire into the financial condition of the estate and to decide whether a Probate Court would have granted a petition for distribution if it had been filed, if notice had been given, if a hearing had been held, and if the interested persons had or had not objected to the petition. Nothing in the language used by Congress warrants the imposition of this heavy administrative burden. Cf. *Plimpton v. Commissioner*, 135 F. 2d 482, 486 (C. C. A. 1st).

The circumstance that petitions for distribution of the income in question would probably have been granted by the probate judge in the exercise of his discretion (cf. R. 119-123) if they had been made, if notice had been given, if a hearing had been held, and if the statutory facts had been shown at the hearing, is not controlling. The preliminary steps required by the statute before distribution could be ordered were not taken and the income would not become distribut-

able under California law until they were taken and an order was entered. The possibility that the income could have been made currently distributable in 1942 and 1943, if the proper steps had been taken, does not suffice to show that the income was currently distributable. Cf. *Plimpton v. Commissioner, supra*, in which the court held that income was not currently distributable within the statutory sense under an instrument permitting distribution in the discretion of the trustees even though as a practical matter the income was distributable currently to the beneficiary who was also a trustee, since the other trustees were completely amenable to the will of the beneficiary-trustee as to distribution of the income.

The taxpayer argues (Br. 20-22) that, because the Probate Court made findings in the decrees of distribution made in 1942 and 1943, which covered all the necessary points under Sections 1000 and 1001 of the Probate Code, the court no longer had any discretion to exercise and orders for distribution of all the income in both years would have been mandatory. But this contention overlooks the fact that Section 1001 requires that the facts necessary to support an order of distribution *shall appear at the hearing* on the petition as to which the order is made. Furthermore, even if the statutory facts could be taken as already settled by findings made on other petitions, the court had no jurisdiction to make orders of distribution of the remaining income in 1942 and 1943 because no petitions for distribution were filed, no notices of hearing were given, no opportunity was

given to interested persons to object, and no hearings were held, all of which were required by the statutes.

The argument (Br. 22-24) that the widow had a "present right" to distribution of the remaining income in 1942 and 1943 because the three children received their share of the income in those years has no merit. The right of the widow to a distribution at some time of a share of the income for those years in the proportion given her by the testator is not disputed, but the question is whether her share was presently distributable in 1942 and 1943. Since her right to current distribution depended on entry of orders of distribution in her favor, which were not entered, it is irrelevant that orders had been entered authorizing distribution of other amounts to other legatees.⁴

B. Section 162 (c)

Section 162 (c) of the Code authorizes an estate during the period of administration to deduct the income of the estate for its taxable year which is properly paid or credited during the year to any legatee, provided the amount allowed as a deduction is included in the legatee's income.⁵

⁴ In view of the express provisions in Section 162 (b) of the Code and Section 29.162-2 (b) of Treasury Regulations 111, the Government has never contended, nor did the Tax Court hold, that actual distribution of the widow's share of the income to her was necessary for Section 162 (b) to apply. Thus, the taxpayer's "third point" (Br. 24-28) seems to have no relevance, the fact that actual distribution is not required by Section 162 (b) being admitted.

⁵ Section 162 (c) also applies to income which in the discretion of the fiduciary may either be distributed to the beneficiary or accumulated, but this has no relevance here since the will was silent

The taxpayer estate has been allowed deductions by the Tax Court for the income paid to the legatees in 1942 and 1943 pursuant to the orders of distribution so that the only question here is whether it properly "credited" in 1942 and 1943 any of the unpaid and undistributed income for those years to the legatee entitled to receive it under the will. The Tax Court held (R. 152) that there was no evidence that the undistributed income of these years was "properly credited" to any of the beneficiaries as required by statute.

The taxpayer apparently contends in this Court that the undistributed income was "credited" to the widow because the other legatees, the three children, received their proportionate shares of the income in 1942 and 1943. (Br. 22-24, 27-29). But the mere fact that the widow would have been entitled to receive the remaining income in 1942 and 1943 if she had petitioned the Probate Court and procured an order for its distribution does not establish that the income was credited to her in those years. Income is credited within the meaning of Section 162 (c) when it is allocated to, or set aside for, the beneficiaries in such a way as to be unconditionally available to them. See *Frank's Trust of 1931 v. Commissioner*, 165 F. 2d 992 (C. C. A. 3d); *Commissioner v. Stearns*, 65 F. 2d 371, 373 (C. C. A. 2d), certiorari denied, 290 U. S. 670; *Lynchburg Trust & S. Bank v. Commissioner*, 68 F. 2d 356, 359 (C. C. A. 4th), certiorari denied, 292 U. S. 640.

as to distribution or accumulation of the income accruing to the estate during administration.

Estate of Igoe v. Commissioner, 6 T. C. 639, on which taxpayer relies here, involved entirely different facts, as the Tax Court pointed out. (R. 152-153.) There specific credits were made to the accounts of the beneficiaries from which they drew large amounts of cash, and the facts warranted the finding that the credits were unconditionally available to the beneficiaries at all times (p. 647) and thus that the amounts were properly credited within Section 162 (c). Nothing done in the present case is comparable to the facts showing credits in the *Igoe* case.

The question of whether a proper credit has been made is one primarily for the Tax Court (*Frank's Trust of 1931 v. Commissioner, supra*, p. 993), and here the record fully supports its conclusion that the undistributed income was not properly credited to the legatees in 1942 and 1943. It follows that the amount of the undistributed income may not be deducted by the taxpayer under Section 162 (c).

The taxpayer also argues briefly (Br. 44-46) that the Commissioner could have determined that the period of administration referred to in Section 162 (c) of the Code had ended within the meaning of Section 29.162-1 (c) of Treasury Regulations 111 (Appendix, *infra*), thus that the residue would be deemed to have been distributed, and that all the income would be in fact the income of the residuary legatees. The Commissioner, however, *did not determine* that the period of administration had ended, and the regulation cited above does not require it, since there was no showing here that the ordinary duties of administration had been performed. As the Tax Court pointed out (R.

151), the administration had been in progress for only two years, the estate had unpaid liabilities still outstanding at the end of 1943 in excess of \$1,100,000, and the estate tax liability had not at that time been finally determined. The existence of such a large amount of unpaid debts clearly forbids the conclusion that administration had actually been completed, particularly where the period of administration had not been unreasonably delayed and had not been terminated under local law. Cf. *Chick v. Commissioner* (C. C. A. 1st), decided February 27, 1948 (1948 P-H, par. 72,384); *Frederich v. Commissioner*, 145 F. 2d 796 (C. C. A. 5th).

C. Section 162 (d) (1)

The taxpayer argues (Br. 35-44) that the distributions of corpus ordered by the Probate Court in the years 1942 and 1943 should, under Section 162 (d) (1) of the Code, be deemed to be distributions of income in the amounts of the fair market values of the corpus distributed,⁶ and deductible as payments of income

⁶ The taxpayer of course could not contend that the distributions of the stocks and real estate authorized to be distributed in kind were in fact distributions of income. The petition of the executors filed November 25, 1942, prayed for authority to distribute from corpus certain shares of stock (R. 140) and the two petitions on June 18, 1943, and August 4, 1943, requested authority to make a partial distribution of the assets of the estate (R. 141-142). This is in contrast to the petitions in 1942 and 1943 which requested authority to distribute specific amounts from the *income* of the estate for each year, and the orders entered on the petitions which authorized distributions of *income*. (R. 138-139, 142). Thus, both the taxpayer's executors and the Probate Court clearly identified the distributions which were of income and those which were from corpus.

under Section 162 (c). The Tax Court properly rejected this contention. (R. 153-157.)

Section 162 (d)(1) was added to the Code by Section 111 (c) of the Revenue Act of 1942 and, by an express exception, it has no application to gifts or bequests which are not directed to be paid, credited, or distributed at intervals. In cases where the will or trust instrument directs an amount to be paid, credited, or distributed *at intervals* (e. g., an annuity), and under the terms of the will or instrument the amount may be taken from "other than income" of the estate or trust (e. g., an annuity payable out of income but if that is insufficient, out of corpus), the section provides that the amount paid, credited, or to be distributed currently during the taxable year shall be considered as made from income, to the extent of the distributable income of the estate or trust for the year. The section was explained in S. Rep. No. 1631, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 504, 560), as follows:

Section 162 of the Code is proposed to be amended by the addition of a new subsection (d), which contains three paragraphs. Paragraph (1) is similar to section 162 (d) as proposed to be added by section 110 of the bill passed by the House, but provides more detailed rules for allocating income among legatees and beneficiaries in cases in which amounts can be paid, credited, or distributed out of other than income.

Section 162 (d) (1) applies to all cases in which the executor or trustee can or must (by the terms of the trust instrument or will) pay

the whole or any part of a gift, bequest, devise, or inheritance out of other than income, except that no income is to be allocated under it to a legatee, heir, or beneficiary of a lump sum gift, bequest, devise, or inheritance. It applies in all cases of annuities where any deficiency in the amount to be paid can be made up by a payment out of corpus of the trust. It also applies in cases where amounts are to be paid or credited at intervals and the executor or trustee has discretion whether to pay or credit such amounts out of income or corpus, regardless of the source (income or corpus) to which the executor attributes such amount. * * *

As the Tax Court pointed out (R. 155-156) the subsection was enacted as a complement to the amendment to Section 22 (b) (3) of the Internal Revenue Code made by Section 111 (a) of the Revenue Act of 1942 (26 U. S. C. 1940 ed., Sec. 22). *Burnet v. Whitehouse*, 283 U. S. 148, and *Helvering v. Pardee*, 290 U. S. 365, had previously stated the rules that recurrent amounts received under a gift, bequest, or by inheritance as an annuity, where the amounts were to be paid at all events whether or not from income or corpus, were not taxable income of the beneficiary under Section 22 (b) (3), and were not deductible by the fiduciary under Section 162 to the extent of the income distributed in payment of such annuity. The basic purpose of the 1942 amendments to Sections 22 (b) (3) and 162 was to counteract the effect of these decisions. S. Rep. No. 1631, *supra*, p. 70; H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 66-68 (1942-2

Cum. Bull. 372, 424-425). See also *Carlisle v. Commissioner*, 165 F. 2d 645 (C. C. A. 6th).

The instant case is not within Section 162 (d) (1), as the Tax Court held (R. 154-155), because the will here did not make a bequest of an annuity, or of amounts to be paid, credited, or distributed at intervals. The testator merely bequeathed his residuary estate to his wife and children, a lump sum bequest, and this type of bequest is specifically excluded from the operation of Section 162 (d), as already noted. Section 29.162-2(a) of Treasury Regulations 111 (Appendix, *infra*) so construes the statute and the legislative history, referred to above, shows that a legacy of this type, having no similarity to an annuity, was not within the scope of the amendments. The mere fact that partial distributions were authorized from time to time and that distribution was not ordered to be made all at one time does not convert the bequest into one which, under the terms of the will, was to be distributed at intervals, or as an annuity.

Nor do Sections 1000 and 1010 of the California Probate Code make the bequest one which was payable at intervals, as taxpayer contends. (Br. 42.) These sections do not purport to change the character of the bequest and do not direct that a lump sum bequest *must* be distributed periodically or at intervals. They merely permit the filing of a petition for distribution of a legacy, or a part thereof, in certain circumstances.

Taxpayer cites G. C. M. 24702, 1945 Cum. Bull. 241 (Br. 38-40), as supporting its contention. A reading of the memorandum shows that it does not. It was not concerned with Section 162 (d) (1) in any way.

It ruled that an amount distributed by an estate out of its income during the year in which the residue became payable was taxable income of the residuary legatee and deductible by the estate under Section 162 (b) of the Code, as amended by Section 111 (b) of the Revenue Act of 1942. This conclusion was based on the 1942 amendment and its legislative history (see fn. 1, *supra*), which was intended to contravene previous cases which had treated such distributions as exempt from tax as corpus on the theory that when administration was completed, the residue was determined, that the residue included the undistributed income earned during administration, and that the residue consisting of both principal and income was received by the legatee as a bequest, exempt from income tax under Section 22 (b) (3), (prior to the 1942 amendment). E. g., *Anderson's Estate v. Commissioner*, 126 F. 2d 46 (C. C. A. 9th).

The ruling has no application to the problem in the present case, which does not involve income distributed in the year in which administration ends and the residue becomes fixed, and further, in any case, as already stated, the ruling does not construe or apply Section 162 (d) (1).

Finally, the regulations support the Tax Court's holding that the case at bar is not covered by Section 162 (d) (1). See Section 29.162-2 (a), quoted in the Appendix, *infra*. The portion of the regulation printed by taxpayer (Br. 41-42) deals merely with the method of allocating income *in cases to which Section 162 (d) (1) applies*, and it has no bearing in a case like the present where the section does not apply.

CONCLUSION

The decision of the Tax Court should be affirmed.
Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,

GEORGE A. STINSON,

HELEN GOODNER,

Special Assistants to the Attorney General.

APRIL 1948.

APPENDIX

California Probate Code (Deering's California Codes, Annotated, 1944):

§ 300. *Title to decedent's estate: [When property passes: Possession and control thereof: Liability for administration expenses, debts and family allowance]*. When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code.

§ 956. *Closing administration: [Payment of legacies: Distribution: Debts unpaid: Condition of estate]*. If all of the debts have been paid by the first order for payment, the court must direct the payment of legacies and the distribution of the estate among the persons entitled, as provided in the next chapter; but if there are debts remaining unpaid, or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for such time as may be reasonable.

§ 1000. *Petition [by person entitled: Hearing: Notice: Persons entitled to oppose]*. At any time after the lapse of four months from the issuing of letters testamentary or of administra-

tion, the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court to distribute a legacy, devise or share of the estate, or any portion thereof, to any person entitled thereto, upon such person giving a bond as hereinafter provided. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. When the petitioner is not the executor or administrator, notice must be given to the executor or administrator by citation. An executor or administrator, not petitioning, or any person interested in the estate may resist the application.

§ 1001. *Allowance of distributee's share: [Facts shown at hearing: Indebtedness to estate: Taxes: Possibility of loss or injury: Order for delivery: Bond of recipient]*. If, at the hearing, it appears that the estate is but little indebted and that all inheritance taxes payable in said proceeding have been paid, or that the State Controller, an inheritance tax attorney, or an assistant inheritance tax attorney has in writing consented to said distribution and the legacy, devise or share of the estate, or any portion thereof, may be distributed to the person entitled thereto, without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver the legacy, devise or share of the estate or such portion thereof as the court may designate, to the person entitled thereto, upon receiving from such person a bond executed by him, and payable to the executor or administrator in such sum as the court may designate, with sureties to be approved by the judge, and conditioned for the payment, whenever required, of the proportion of the debts due from the estate, not exceeding the value or amount of the legacy or

portion of the estate, so ordered to be delivered. When the time for filing or presenting claims has expired, and all uncontested claims have been paid or are sufficiently secured by mortgage or otherwise, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond.

§ 1010. *Petition: [Setting for hearing: Notice: Persons entitled to oppose]*. When the time for filing or presenting claims has expired and all uncontested claims have been paid, or are sufficiently secured by mortgage, or otherwise, but the estate is not in a condition to be finally closed and distributed, the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court for a ratable payment of the legacies, or ratable distribution of the estate, to the heirs, devisees or legatees, or their assignees, grantees or successors in interest, or, where there are priorities, to those of the class or classes having priority; or, if the decedent was a nonresident and left a will which has been duly proved or allowed in the State of his residence, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, or it is for the best interests of the estate, that any part of the estate in this State should be delivered to the executor or administrator in the State of the decedent's residence, the executor or administrator may petition the court for an order authorizing the delivery of such portion of the estate as the court shall deem safe and proper and for the best interests of the estate, to the executor or administrator in the State of the decedent's residence. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. Any person interested in the estate or

any coexecutor or coadministrator may resist the application.

§ 1011. [*Hearing: Showing of essential facts: Order requiring distribution*]. If, at the hearing, it appears that the allegations of the petition are true, that all inheritance taxes payable in said proceeding have been paid or that the State Controller, an inheritance tax attorney, or an assistant inheritance tax attorney, has in writing consented to said distribution, and that no injury will result to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver to the heirs, devisees or legatees, or to their assignees, grantees or successors in interest, or to the executor or administrator in the State of decedent's residence, such portion of the estate as the court may designate.

§ 1021. *Decree of distribution: [Naming of persons and shares: Right to recover shares: Conclusiveness of decree]*. In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees.

* * * * *

§ 1200. *Mode of giving notice in certain instances: [Posting of notice: Notice by mail: Proof of notice: Effect of finding.]* Upon the filing * * * of a petition for partial or ratable or final distribution, * * * and in all cases in which notice is required and no other time or method is prescribed by law or by court or judge, the clerk shall set the same for hearing by the court and shall give notice of the petition or application or report or account by causing a notice to be posted at the courthouse of the county where the proceedings

are pending, at least ten days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and notifying all persons interested to appear at the time and place mentioned in the notice and show cause, if any they have, why the order should not be made.

Notice by mail. At least ten days before the time set for the hearing of such petition, account or report, the petitioner or person filing the account or desiring the confirmation of a report of appraisers must cause notice thereof to be mailed to the executor or administrator, when he is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post-office addresses given in their requests for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such persons.

[*Proof of notice: Effect of finding.*] Proof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that said notice has been regularly given, the court shall so find in its order, and such order, when it becomes final, shall be conclusive upon all persons.

Internal Revenue Code:

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

(26 U. S. C. 1940 ed., Sec. 161)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) [as amended by Section 111 (b), Revenue Act of 1942, c. 619, 56 Stat. 798]: There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries

whether distributed to them or not. As used in this subsection, 'income which is to be distributed currently' includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary;

(d) [as added by Section 111 (c), Revenue Act of 1942, c. 619, 56 Stat. 798] *Rules for Application of Subsections (b) and (c).*—For the purposes of subsections (b) and (c)—

(1) *Amounts Distributable Out of Income or Corpus.*—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of

such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust. For the purposes of this paragraph "distributable income" means either (A) the net income of the estate or trust computed with the deductions allowed under subsections (b) and (c) in cases to which this paragraph does not apply, or (B) the income of the estate or trust minus the deductions provided in subsections (b) and (c) in cases to which this paragraph does not apply, whichever is the greater. In computing such distributable income the deductions under subsections (b) and (c) shall be determined without the application of paragraph (2).

* * * * *

(26 U. S. C. 1940 ed., Sec. 162.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.162-1. INCOME OF ESTATES AND TRUSTS.—

* * * * *

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

* * * * *

(b) Any income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to a legatee, heir, or beneficiary, whether or not such income is actually distributed. For this purpose, it is provided in section 162 (b) that "income which is to be distributed currently" includes income of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary.

(c) Any income of the estate of a deceased person for its taxable year which is properly paid or credited during such year to a legatee or heir, and any income either of such an estate or of a trust for its taxable year which is similarly paid or credited during that year to a legatee, heir, or beneficiary if there was vested in the fiduciary a discretion either to distribute or to accumulate such income.

* * * * *

The income of an estate of a deceased person, as dealt with in the Internal Revenue Code, is therein described as received by the estate during the period of administration or settlement thereof. The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. * * *

* * * * *

SEC. 29.162-2. ALLOCATION OF ESTATE AND TRUST INCOME TO LEGATEES AND BENEFICIARIES.—

(a) *Allocation among annuitants.*—Section 162 (d) (1) applies to all cases in which the executor or trustee can or must (for example, by the terms of the trust instrument or will) pay the whole or any part of a gift, bequest,

devise, or inheritance out of other than income, except that no income is to be allocated under it to a legatee, heir, or beneficiary of a lump sum gift, bequest, devise, or inheritance. It applies in all cases of annuities where any deficiency in the amount to be paid can be made up by a payment out of corpus of the trust. It also applies in cases where amounts are to be paid or credited at intervals and the executor or trustee has discretion whether to pay or credit such amounts out of income or corpus, regardless of the source (income or corpus) to which the executor or trustee attributes such amount. * * *

* * * * *

(b) *Allocation among income beneficiaries and legatees.*—* * * As used in section 162, the term “income which becomes payable” means income to which the legatee, heir, or beneficiary has a present right, whether or not such income is actually paid. Such right may be derived from the directions in the trust instrument or will to make distributions of income at a certain date, or from the exercise of the fiduciary’s discretion to distribute income, or from a recognized present right under the local law to obtain income or compel a distribution of income. Income is not considered to become payable within a taxable year where during the entire taxable year there is only a future right to such income. For example, under valid terms of a trust instrument, income received by a trust during its taxable year is to be accumulated until the twenty-first birthday of the beneficiary (or his prior death), at which time the accumulated income is to be distributed to the beneficiary (or his estate, as the case may be). In such case, the income of the trust received in any taxable year prior to the taxable year of the trust in which the date of distribution occurs (the beneficiary’s twenty-first birthday or his prior death) is not income which becomes payable

within such prior taxable year but is income which becomes payable in the taxable year of the trust in which the date of distribution occurs. In any case, income becomes payable at a date not later than the date it is actually paid for the use of the distributee.

*

*

*

*

*

No. 11,795

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ESTATE OF ISADORE ZELLERBACH, Deceased,
J. David Zellerbach and Harold L.
Zellerbach, Executors,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S REPLY BRIEF.

PHILIP S. EHRLICH,

ALBERT A. AXELROD,

2002 Russ Building, San Francisco 4,

Attorneys for Appellant.

FILED

MAY 19 1948

Subject Index

| | Page |
|---|------|
| Restatement of question presented..... | 1 |
| Reply to respondent's argument with respect to Section 162(b) of the Internal Revenue Code..... | 2 |
| Reply to respondent's argument with respect to Section 162(c) of the Internal Revenue Code..... | 10 |
| Reply to respondent's argument with respect to Section 162(d)(1) of the Internal Revenue Code..... | 12 |
| Conclusion | 14 |

Table of Authorities Cited

| Cases | Pages |
|---|----------|
| Carlisle v. Commissioner, 165 Fed. (2d) 645..... | 8, 9, 12 |
| Estate of Igoe v. Commissioner, 6 T. C. 639..... | 11 |
| Henry S. Stephenson, deceased, 65 Cal. App. (2d) 120..... | 2 |
| William C. Chick v. Commissioner, 7 T. C. 1414..... | 7, 12 |

Statutes

| | |
|--|---------------|
| California Probate Code, Section 1001..... | 11 |
| Internal Revenue Code: | |
| Section 162 | 7 |
| Section 162(b) | 2, 8 |
| Section 162(c) | 2, 7, 10, 15 |
| Section 162(d) | 12 |
| Section 162(d)(1) | 2, 11, 12, 15 |

Regulations

| | |
|---------------------------|----|
| Treasury Regulations 111: | |
| Section 29.162-1(c) | 12 |
| Section 29.162-2(b) | 4 |

No. 11,795

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ESTATE OF ISADORE ZELLERBACH, Deceased,
J. David Zellerbach and Harold L.
Zellerbach, Executors,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S REPLY BRIEF.

RESTATEMENT OF QUESTION PRESENTED.

Counsel for appellee (hereinafter referred to as respondent) on page 2 of their brief, state the question presented as follows:

“Whether, in determining its taxable net income for 1942 and 1943, the taxpayer estate is entitled, under Section 162(b), (c), or (d)(1) of the Internal Revenue Code, to deduct, in addition to the income distributed to the legatees under the decedent's will, all of the remaining income in each year, although such income was not distributed, was not to be distributed currently, and was not credited, to the legatees in those years.”

This is not, in our opinion, a correct statement of the question, and the following more correctly expresses it:

Whether in determining its taxable net income for 1942 and 1943, the taxpayer's estate is entitled, under Section 162(b), (c) or (d)(1) of the Internal Revenue Code, to deduct, in addition to the income distributed to legatees under decedent's will, all of the remaining income in each year although such income was not distributed, where (1) the legatee who was entitled to such income or the executors could have petitioned to the Probate Court for a distribution of such, and said legatee reported such income in her income tax returns as having been received by her and paid the tax thereon, and accordingly, whether said legatee in 1942 and 1943 had a present right to such income, and further (2) whether the ordinary duties pertaining to the administration had been completed and it was deemed that the estate had been distributed and the income taxable to the legatees, and (3) whether under Section 162(d)(1) of the Internal Revenue Code a distribution of corpus in a year in which the estate had distributable income is taxable to the legatees to the extent of the distributable income.

**REPLY TO RESPONDENT'S ARGUMENT WITH RESPECT TO
SECTION 162(b) OF THE INTERNAL REVENUE CODE.**

In Part A of the appellee's summary of argument (Respondent's Brief, page 9) counsel for appellee states:

“Although the legatees had the right to petition the Probate Court for distribution of the income and, if the statutory procedure for notice and hearing was complied with and if the facts required by the California statutes were made to appear at the hearing, to have orders made in their favor, nevertheless, the entry of orders for distribution was not available as a matter of right but depended on the precedent statutory steps. These steps were not taken in 1942 and 1943. It follows that the undistributed income was not currently distributable in those years.”

In answer to this argument we call attention to the authorities which we cited on pages 17 to 19 of appellant's opening brief interpreting the relevant provisions of the California Probate Code, and in particular to the case of *Henry S. Stephenson, deceased*, 65 Cal. App. (2d) 120, wherein the Court stated:

“The Probate Code clearly gives power to the court to order a partial distribution of an estate and, given the prescribed conditions, it is made *mandatory* upon the court to make the order.”

As we also pointed out on pages 21 to 24 of our opening brief, all the prescribed conditions had been met and there was no discretion left for the Probate Court to exercise. If a formal petition had been filed either by the executors or Jennie B. Zellerbach, the widow and a residuary legatee, to distribute the remaining undistributed income for each of the years 1942 and 1943, the Court would have distributed it and could not have legally done otherwise.

Under such state of facts, the respondent's conclusion that "It follows that the undistributed income was not currently distributable in those years" is not sound, particularly in view of the Commissioner's own regulations, Section 29.162-2(b), which provides as follows:

"As used in Section 162, the term 'income which becomes payable' means income to which the legatee, heir, or beneficiary has a present right, whether or not such income is actually paid. Such right may be derived from the directions in the trust instrument or will to make distributions of income at a certain date, or from the exercise of the fiduciary's discretion to distribute income, or from a recognized present right under the local law to obtain income or compel a distribution of income."

Nowhere does counsel for the respondent discuss the above regulations and point out wherein it does not apply to the facts in the instant case.

Counsel states on page 17 of their brief that

"Because * * * the right to distribution depended upon an order for distribution by the court, and because no orders were made or obtainable as a matter of right, it necessarily follows that the undistributed income in 1942 and 1943 was not currently distributable in those years by virtue of California law within the meaning of Section 162(b)."

and on page 20 of their brief:

"The argument (Br. 22-24) that a widow had a 'present right' to distribution of the remaining

income in 1942 and 1943 because the three children received their share of the income in those years has no merit.”

In footnote 4 on page 20, counsel for respondent states further:

“In view of the express provisions in Section 162(b) of the Code and Section 29.162-2(b) of Treasury Regulations 111, the Government has never contended, nor did the Tax Court hold, that actual distribution of the widow’s share of the income to her was necessary for Section 162(b) to apply. Thus, the taxpayer’s ‘third point’ (Br. 24-28) seems to have no relevance, the fact that actual distribution is not required by Section 162(b) being admitted.”

Since counsel concedes that *actual distribution is not required*, we submit that the rest of their contentions are without merit. The regulation above quoted states that the “present right” as used therein may be derived from any one or more of the following three propositions:

- (1) Directions in the will to make distributions of income at a certain date;
- (2) The exercise of the fiduciary’s (executor’s) discretion to distribute income; and
- (3) A recognized present right under the local law to obtain income or compel a distribution of income.

In answer to points 1 and 2 we call attention to the following language on page 12 of respondent’s brief, wherein they state:

“The testator’s will itself contained no provision directing that the income received by the estate during the period of administration was to be distributed currently to the legatees named by him. (R. 138.) *On the contrary, the will implies that distribution of the income was to be discretionary with the executors, since they were given complete power to deal with the estate or any part according to their judgment and discretion and without court order.*” (Italics ours.)

It is obvious from the record that the executors had a discretion, otherwise they could not have arbitrarily petitioned for distribution of one-sixth of the income to each of the children while not petitioning for any distribution of the income to the widow, yet at the same time petitioning for a distribution of a considerable amount of corpus, which distribution of corpus was on a proportionate basis with the widow included in such distribution. (Tr. pp. 62-65, 68-72, 93-97, 87-89, 80-84.)

The third point, namely, a recognized present right under the local law to obtain income or compel a distribution of income we have discussed at length at pages 12 to 24 of our opening brief, and for that reason we do not repeat any of said argument herein.

Finally, counsel for the respondent states on page 20 of their brief as follows:

“The argument (Br. 22-24) that the widow had a ‘present right’ to distribution of the remaining income in 1942 and 1943 because the three children received their share of the income in those

years has no merit. The right of the widow to the distribution at some time of a share of the income for those years in the proportion given her by the testator is not disputed, but the question is whether her share was presently distributable in 1942 and 1943. Since her right to current distribution depended on entry of orders of distribution in her favor, which were not entered, it is irrelevant that orders had been entered authorizing distribution of other amounts to other legatees."

We submit that if the respondent's theory is adopted, namely, that it is necessary to obtain orders from the Probate Court, under the circumstances herein presented, before an estate may claim a deduction for income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated (Sec. 162(c)), then the provisions of Section 162 of the Internal Revenue Code may entirely be circumvented by the mere device of not applying for decrees of distribution of income and merely applying for distribution of the corpus which in the case of large taxpayers may be very advantageous taxwise. We further submit that our theory correctly expresses the interest of Congress in enacting the provisions of Section 162 of the Internal Revenue Code. In this connection we call attention to the comparatively recent case of *William C. Chick v. Commissioner*, 7 T. C. 1414, wherein the executors had not distributed the estate and the Commissioner had ruled that the administration of the estate had

been unduly prolonged, that the estate was no longer in the process of administration, and taxed the income to the beneficiaries of the estate under Section 162(b), notwithstanding that *there had not been any decrees of distribution*. The Tax Court upheld the Commissioner, and we call attention to the following language appearing on pages 1421 and 1422 of the opinion:

“As we understand petitioners’ argument, it is that only the probate courts of the State of Massachusetts can determine when an administration is closed in the State of Massachusetts, and that it naturally follows that as long as such administration is not closed the estate must be considered ‘in process of administration,’ and the income of the estate must be taxed under the Federal statute to the estate and not as the income of the testamentary trust provided in decedent’s will. If petitioners’ position is correct, then it seems to follow that an administration can be prolonged indefinitely in the state courts and long after any need for it exists, and the income of the estate be still taxable to it as a separate entity and not to any testamentary trust provided in the will. Our Court has not subscribed to that doctrine and in several cases we have given approval to the part of Regulations 103 which is printed in the margin.”

In conclusion, we call attention to the language appearing in the case of *Carlisle v. Commissioner*, 165 Fed. (2d) 645, 648, (cited by respondent in connection with Section 162(d)(1)), wherein the Commissioner taxed the beneficiaries of a will with income

as having been received in 1942 although no formal order was made until 1943, which language is as follows:

“It is quite true that authority from the Probate Court for the October 1942 distribution was neither applied for nor allowed until January, 1943, but the tax court was not in error in viewing the proceedings as mere formalization of authority exercised in 1942.”

(The facts are set forth in detail in the opinion of the Tax Court reported in 8 T.C. 563, 564.)

We submit that these cases definitely show the fallacy of the respondent's contention that it is necessary to obtain formal orders of the Probate Court before income may be taxed to a beneficiary. The Commissioner certainly has taken contrary positions in the *Carlisle* case, *supra*, and the instant case. The taxpayer in the *Carlisle* case was contending that since no order was obtained in 1942, the income was not distributed in that year, to which contention the Commissioner replied that orders were not necessary, and both the Tax Court and the Circuit Court upheld him. In the instant case the Commissioner states that orders are necessary before income may be deemed distributable in a particular year, to which contention we say that neither the Code nor the regulations require a formal order and that under the statement of the Court the Tax Court should have determined that the estate was entitled to a deduction for all the income in both 1942 and 1943.

REPLY TO RESPONDENT'S ARGUMENT WITH RESPECT TO
SECTION 162(c) OF THE INTERNAL REVENUE CODE.

On page 9 of respondent's brief, counsel for respondent state as follows:

"The undistributed income for 1942 and 1943 may not be deducted by the taxpayer under Section 162(c) of the Code, because it was not properly credited in those years to the legatees entitled to receive it under the testator's will. There is no evidence that the unpaid income was made unconditionally available to the legatees in 1942 and 1943, and thus there was no credit, as the term is used in the statute."

In answer to this argument, we call attention to the record in the instant case. First, under the decedent's will the residue of the estate was distributed three-sixths to Jennie B. Zellerbach, and one-sixth each to J. David Zellerbach, Harold L. Zellerbach and Claire Zellerbach Saroni. In the petition for partial distribution of the income which was filed by the executors in the year 1942 (Tr. pp. 62-65) the executors allege that for the calendar year 1942 the estate had income in the sum of \$317,000, of which the widow was entitled to one-half, but which income they desired to distribute \$22,000 to Jennie B. Zellerbach and \$53,000 to each of the other residuary legatees, making a total distribution of \$181,000. The Court decreed that said distribution could be made without injury to the estate or any person interested therein. (Tr. p. 67.) We submit that by such petition and decree there was *ipso facto* allocated to Jennie B. Zellerbach the balance of the undistributed income

for the year 1942, to-wit, the sum of \$137,000, because of the fact that there can be no preference in distributions among persons of the same class, residuary legatees being all in the same class. Therefore, the executors' very act taken in the Probate Court was tantamount to an allocation to Jennie B. Zellerbach of her proportionate amount of the income for said year. It was made unconditionally available to her by the filing of the petition for partial distribution and the decree of the Probate Court based thereon. The evidence in the case conclusively shows that at all times there were sufficient assets available in the hands of the executors to have paid the amount of income to which Jennie B. Zellerbach was entitled. If there had not been, the Court would not have dispensed with the giving of a bond by the distributees, (Tr. p. 67) which bond it could have required under the provisions of Section 1001 of the California Probate Code. What we have said with respect to 1942 is equally true for the year 1943.

Furthermore, Jennie B. Zellerbach reported the entire income as having been received by her for each of the years 1942 and 1943, and the estate claimed credit therefor in its amended returns which indicated that the executors had allocated the income to Jennie B. Zellerbach. (Tr. pp. 45, 53.) We can see no appreciable difference between the instant case and the *Estate of Igoe v. Commissioner*, 6 T. C. 639.

Finally, the respondent argues that because the estate had large amounts of unpaid liabilities, that the estate was still in the process of administration under

the California law. On pages 44 to 46 of appellant's opening brief we point out the regulations in connection with this subject matter. We submit that in view of the fact that the executors were distributing large amounts of the corpus of the estate and that the assets of the estate, even after the distribution of the large amounts of the corpus, were still approximately three times the amount of the unpaid liabilities, that the administration of the estate was to all intents and purposes closed within the meaning of the provisions of Section 29.162-1(c) of the regulations quoted at page 45 of appellant's opening brief.

We also call attention to the case of *William C. Chick v. Commissioner*, *supra*, and in particular to the language therefrom quoted above. It is obvious that if the executors had desired, they could have very readily discharged the liabilities and wound up the estate.

**REPLY TO RESPONDENT'S ARGUMENT WITH RESPECT TO
SECTION 162(d)(1) OF THE INTERNAL REVENUE CODE.**

Respondent argues that because the distributions of the corpus made in the years 1942 and 1943 were bequests of the residue, and were not under the will payable at intervals, that the provisions of 162(d)(1) do not apply, citing *Carlisle v. Commissioner*, 165 Fed. (2d) 645.

We find nothing in this decision which states that the provisions of Section 162(d) of the Internal Revenue Code, as contained in the 1942 amendment to

Section 162(b), make it applicable only to those situations where the will provides that a bequest is to be paid at intervals. The holding of the Court is stated in the first headnote to the decision as follows:

“The 1942 amendment of the Revenue Code relating to deductions from net income of an estate or trust in amount of income distributed currently, including income which becomes payable to legatee, heir, or beneficiary was intended to include in income of legatee or beneficiary, the income of an estate or trust which became payable to legatee or beneficiary in year of receipt though constituting part of an accumulation of income paid to residuary legatee upon termination of estate. 26 U.S.C.A. Int. Rev. Code, Secs. 22(b), 162(b).”

We quoted on pages 38 and 40 of appellant's opening brief from General Counsel's memorandum opinion No. 24702, the last paragraph of which opinion reads as follows:

“Accordingly, it is the opinion of this office that amounts distributed by an estate out of its income during the taxable year in which the residue becomes payable are, to the extent the estate had income (other than income in respect of a decedent) for such taxable year, taxable to the legatee and deductible by the estate under Section 162(b) of the Internal Revenue Code, as amended by Section 111 of the Revenue Act of 1942, regardless of the fact that under State law such income is considered principal to the legatee, except where the distribution is made in satisfaction or payment of a pecuniary legacy. (See

Old Colony Trust Co. et al v. Commissioner, 38 B.T.A. 828 (CCH Dec. 10, 458), and *Arthur H. Wellman v. Welch*, 99 Fed. (2d) 75 (38-2 U.S. T.C. Sec. 9508), with respect to the exception.)”

As we have pointed out on page 35 of appellant’s opening brief, quoting from the record, in 1942 there was distributed corpus of a value of \$1,146,000; in 1943 there was distributed corpus of a value of \$30,950, and that under these circumstances the amounts distributed by an estate out of residue (all of said distributions being out of residue), to the extent that the estate had distributable income, will be deemed distribution of income.

CONCLUSION.

In conclusion, appellant again respectfully submits that the evidence in this case clearly sets forth that the entire income of the estate of the decedent taxpayer, the appellant herein, for the years 1942 and 1943 should be deemed as having been distributed in full to all the residuary legatees of the estate in the proportions which they take under the decedent’s will; that the estate is entitled to a credit for all of such income, the same having been included in the respective income tax returns of the residuary legatees for each of said years; that the Tax Court erred in holding said legatees (beneficiaries) had no present right to the 1942 and 1943 income of the appellant; that it further erred in holding that the

appellant was not entitled to any deduction for the years 1942 and 1943 under Section 162(c) of the Internal Revenue Code in addition to the amounts actually distributed out of income; that the Tax Court further erred in holding that the provisions of Section 162(d)(1) of the Internal Revenue Code was not applicable.

Finally, the appellant contends, and respectfully submits, that the decision of the United States Tax Court should be reversed; that the determination that there were deficiencies in the income taxes for the years 1942 and 1943 in the respective amounts of \$1,768.55 and \$67,388.46 was erroneous and should be reversed and in lieu thereof it should be determined that the appellant is entitled to a refund for the year 1942 in the amount of \$71,585.08, and that there is no income tax due from the appellant for the year 1943.

Dated, San Francisco,
May 10, 1948.

Respectfully submitted,
PHILIP S. EHRLICH,
ALBERT A. AXELROD,
Attorneys for Appellant.

No. 11796

United States
Circuit Court of Appeals
For the Ninth Circuit

CENTRAL INVESTMENT CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

JAN 6 1948

PAUL P. O'BRIEN
CLERK

No. 11796

United States
Circuit Court of Appeals
For the Ninth Circuit

CENTRAL INVESTMENT CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|--|------|
| Answer | 13 |
| Appearances | 1 |
| Certificate of Clerk..... | 86 |
| Decision | 60 |
| Designation of Points Upon Which Petitioner Intends to Rely and of Portions of Record Necessary for Consideration Thereof..... | 87 |
| Docket Entries | 2 |
| Findings of Fact and Opinion..... | 47 |
| Findings of Fact..... | 47 |
| Opinion | 52 |
| Motion for Review by the Court of Report of a Division (Judge Hill)..... | 60 |
| Notice of Filing Petition for Review..... | 79 |
| Order for Consideration of Original Exhibits.. | 90 |
| Order Directing Transmission of Original Re- porter's Transcript and Original Exhibits on File with the Tax Court..... | 81 |

| | |
|--|----|
| Petition | 3 |
| Exhibit A—Notice of Deficiency and State- ment | 8 |
| Verification | 7 |
| Petitioner's Designation of Contents of Record on Review..... | 82 |
| Petition for Review..... | 75 |
| Transcript of Hearing..... | 15 |
| Opening Statement on Behalf of the Peti- tioner | 16 |
| Opening Statement on Behalf of the Re- spondent | 19 |
| Witnesses, Respondent's: | |
| Freese, Harry R. | |
| —direct | 21 |
| Kruger, Pearl M. | |
| —direct | 35 |
| —cross | 44 |

The Tax Court of the United States

Docket No. 7959

CENTRAL INVESTMENT CORPORATION
(a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES

For Taxpayer:

THOMAS R. DEMPSEY, ESQ.,
ELMO H. CONLEY, ESQ.,
JOSEPH D. BRADY, ESQ.,

For Commissioner:

H. A. MELVILLE, ESQ.

DOCKET ENTRIES

1945

May 8—Petition received and filed. Taxpayer notified. Fee paid.

May 8—Copy of petition served on General Counsel.

June 20—Answer filed by General Counsel.

June 20—Request for hearing in Los Angeles, California, filed by General Counsel.

June 23—Notice issued placing proceeding on Los Angeles, California, calendar. Service of answer and request made.

1946

Sept. 11—Hearing set November 4, 1946, at Los Angeles, California.

Nov. 5—Hearing had before Judge Hill on merits. Briefs due 12/20/46. Replies 1/20/47.

Nov. 27—Transcript of hearing 11/5/46 filed.

Dec. 20—Brief filed by General Counsel.

Dec. 23—Brief filed by taxpayer. 12/24/46 Copy served.

1947

Jan. 20—Reply brief filed by taxpayer. 1/20/47 Copy served.

Jan. 22—Reply brief filed by General Counsel.

July 30—Findings of fact and opinion rendered. Judge Hill. Decision will be entered for respondent. Copy served.

July 31—Decision entered. Div. 15. Judge Black.

Aug. 19—Motion for review by the entire Court filed by taxpayer. 8/21/47 Denied.

1947

- Oct. 30—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Oct. 30—Proof of service filed.
- Oct. 30—Designation of contents of record on review filed by taxpayer with service acknowledged thereon.
- Nov. 3—Certified copy of an order from 9th Circuit directing the Clerk of the Tax Court to transmit the original exhibits in lieu of copying same into the transcript prepared by the Clerk of the Tax Court, filed. [1*]
-

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated March 21, 1945, and as a basis of its proceeding alleges as follows:

1. Petitioner is a corporation organized under the laws of California on October 6, 1921, with its principal office and place of business at Los Angeles, California. Its return for the taxable period here involved, the calendar year 1943, was filed with the Collector of Internal Revenue for the Sixth District of California.

* Page numbering appearing at top of page of original certified Transcript.

2. The notice of deficiency (a copy of which, with accompanying statement, is attached hereto and marked [2] Exhibit A) was mailed to petitioner on March 21, 1945.

3. The taxes in controversy are excess-profits taxes for the calendar year 1943 in the full amount of the asserted deficiency, \$34,971.23.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in ruling and holding that petitioner is not entitled, under Section 23(c)(1) of the Internal Revenue Code, to a deduction for its taxable year ended December 31, 1943, in the amount of \$43,174.36, the amount of a franchise tax which was imposed by the State of California and which accrued and became a lien on petitioner's real property on December 31, 1943.

(b) Respondent erred in failing to determine that there is no deficiency in petitioner's excess-profits tax liability for the calendar year 1943.

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) At all times subsequent to the enactment, in the year 1929, of the "Bank and Corporation Franchise [3] Tax Act" of the State of California (Chapter 13, Laws of 1929, hereinafter referred to as the "Franchise Tax Act"), petitioner has been, and now is, a "corporation" within the meaning of Section 5 of said Act. At all times since the enactment of said Franchise Tax Act, petitioner has been, and now is, the owner of the real property

known as the Biltmore Hotel in the City of Los Angeles, and has been, and now is, “doing business within the limits of” the State of California within the meaning of Section 4(3) of said Act. At no time material hereto did the petitioner have pending any negotiations for the possible sale of its Biltmore Hotel property or contemplate dissolution or liquidation.

(b) At all times material hereto petitioner’s annual accounting period has been the calendar year and petitioner has kept its books of account and made and filed its federal income and excess-profits tax returns on the accrual basis, which basis clearly reflects its income.

(c) During the calendar year 1944 petitioner duly filed with the Franchise Tax Commissioner of the State of California the franchise tax return required by [4] Section 13 of the aforesaid Franchise Tax Act, as amended. Said franchise tax return disclosed petitioner’s gross and net income for the calendar year 1943, in the amounts of \$1,957,-323.27 and \$1,206,923.17, respectively, and disclosed a tax liability of \$43,174.36. Said tax was imposed by Section 4(3) of the Franchise Tax Act and was determined, as provided in said section, “according to or measured by” the net income of petitioner for the calendar year 1943, to-wit, \$1,206,923.17, and was correctly computed at the effective statutory percentage rate applicable to said net income. Said tax of \$43,174.36 was set up on petitioner’s books of account as a liability as of December 31, 1943, before the closing of said books for the calendar

year 1943, and was duly paid by petitioner to the Franchise Tax Commissioner in full during the calendar year 1944. Petitioner has never at any time disputed its liability for the whole or any part of said tax, has never filed any claim for refund or credit for the whole or any part thereof, and has never had, and does not now have, any intention of filing any such claim.

(d) In petitioner's federal income and excess-profits tax returns for the calendar year 1943 a deduction was claimed and taken for said franchise tax [5] in the amount of \$43,174.36. In determining the deficiency here involved respondent disallowed said deduction in its entirety.

(e) Under the specific language of Section 4(7) of said Franchise Tax Act, as amended by Chapter 352 of the Laws of 1943, effective May 7, 1943, the aforesaid tax of \$43,174.36 "accrued" on December 31, 1943.

(f) Under the specific language of Section 29 of said Franchise Tax Act, as amended by Chapters 37 and 352 of the Laws of 1943, effective May 7, 1943, the aforesaid tax of \$43,174.36 constituted a lien upon the real property of the petitioner, with the same force, effect and priority of a judgment lien, and attached on December 31, 1943. The Biltmore Hotel property produced \$1,946,468.64 out of petitioner's total gross income of \$1,957,323.27 for the calendar year 1943, and likewise produced a large gross and net income during the calendar year 1944.

(g) Petitioner, at all times since the enactment of the Franchise Tax Act in 1929 to and including the close of its last completed taxable year on December 31, 1944, has consistently accrued the amount of California franchise tax on its books as of the date on which said [6] tax “accrued” and became a lien under the specific language of the Franchise Tax Act.

Wherefore, petitioner prays that The Tax Court of the United States hear this proceeding, determine that there is no deficiency in petitioner’s excess-profits tax for the taxable and calendar year 1943, and grant such other and further relief as may be equitable in the premises.

/s/ THOMAS R. DEMPSEY,

/s/ ELMO H. CONLEY,

/s/ JOSEPH D. BRADY,

Counsel for Petitioner.

Dated, May 2, 1945. [7]

Verification

State of California,
County of Los Angeles—ss.

F. W. Flint, Jr., being first duly sworn, deposes and says: That he is President of Central Investment Corporation, taxpayer herein; that he has read the foregoing Petition and that the facts

therein stated are true and correct to the best of his knowledge, information and belief.

/s/ F. W. FLINT, JR.

Subscribed and sworn to before me this 2nd day of May, A.D. 1945.

PEARL M. KRUGER,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 7, 1946. [8]

EXHIBIT A

[Letterhead Treasury Department, Internal Revenue Service]

Mar. 21, 1945.

Office of Internal Revenue Agent in Charge, Los Angeles Division. LA:IT:90D:PB

Central Investment Corporation
510 South Spring Street
Los Angeles 13, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1942, discloses an overassessment of \$4,816.41, and that the determination of your declared value excess-profits tax liability for the taxable year mentioned discloses an overassessment of \$850.86, and that the determination of your excess profits tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$34,971.23, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent
in Charge.

PB:vmc

Enclosures:

Statement

Form of waiver

Form 843-4 [9]

STATEMENT

Tax Liability for the Taxable Years Ended December 31, 1942
and December 31, 1943

| Year | Kind of Tax | Liability | Assessed | Over- assessment | Deficiency |
|------|--|--------------|--------------|---------------------|-------------|
| 1942 | Income tax | \$188,773.67 | \$193,590.08 | \$4,816.41 | |
| 1942 | Declared value ex- cess profits tax.... | 3,316.55 | 4,167.41 | 850.86 | |
| 1943 | Excess profits tax .. | 374,338.74 | 339,367.51 | | \$34,971.23 |

In making this determination of your tax liability careful consideration has been given to the report of examination dated June 7, 1944, to your protest dated September 5, 1944, and to the statements made at the conferences held on September 28 and November 10, 1944.

The overassessments shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessments referred to in this letter, by filing with the collector of internal revenue for your district, claims for refund on form 843, copies of which are enclosed, the bases of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. H. C. Diehl, Jr., 1003 Pacific Mutual Building, Los Angeles 14, California, in accordance with the authorization contained in the power of attorney executed by you. [10]

Taxable Year Ended December 31, 1942

ADJUSTMENT TO NET INCOME

| | |
|--|---------------------|
| Net income as disclosed by return..... | \$488,142.61 |
| Additional deduction: Capital stock tax..... | 12,891.89 |
| Net income adjusted..... | <u>\$475,250.72</u> |

Explanation of Adjustment

The correct amount of deduction for capital stock tax accrued is \$18,750.00, whereas the amount claimed in your return is \$5,858.11, an additional deduction of \$12,891.89.

COMPUTATION OF DECLARED VALUE

EXCESS-PROFITS TAX

| | |
|--|-------------------|
| Net income | \$475,250.72 |
| Less: 10% of \$4,250,000.00, value of capital stock as declared in your capital stock tax return for the year ended June 30, 1942..... | <u>425,000.00</u> |
| Net income subject to declared value excess-profits tax | \$ 50,250.72 |
| Declared value excess-profits tax: | |
| 6.6% of \$50,250.72 | \$3,316.55 |
| Correct declared value excess-profits tax liability.... | \$ 3,316.55 |
| Declared value excess-profits tax assessed: | |
| Original acct. No. 1437708..... | <u>4,167.41</u> |
| Overassessment of declared value excess-profits tax | \$ 850.86 |

COMPUTATION OF INCOME TAX

| | |
|--|--------------|
| Net income..... | \$475,250.72 |
| Less: Declared value excess-profits tax..... | 3,316.55 |
| Normal-tax net income..... | \$471,934.17 |
| Surtax net income..... | 471,934.17 |
| Income tax: | |
| Normal tax: 24% of \$471,934.17 | \$113,264.20 |
| Surtax: 16% of \$471,934.17 | 75,509.47 |
| Correct income tax liability..... | \$188,773.67 |
| Income tax assessed: Original, acct. No. 1437708.... | 193,590.08 |
| Overassessment of income tax..... | \$ 4,816.41 |

Taxable Year Ended December 31, 1943

ADJUSTMENT TO EXCESS PROFITS NET INCOME

| | |
|--|----------------|
| Excess profits net income as disclosed by return.... | \$1,265,113.98 |
| Unallowable deduction: California franchise tax.... | 43,174.36 |
| Excess profits net income adjusted..... | \$1,308,288.34 |

EXPLANATION OF ADJUSTMENT

California State franchise tax paid during the year 1944, amounting to \$43,174.36, treated as a deduction on your return for the calendar year 1943 is disallowed, since it is held that such taxes are properly allowable and deductible during the calendar year 1944 under section 23(c) of the Internal Revenue Code.

COMPUTATION OF ADJUSTED EXCESS PROFITS
NET INCOME

| | | |
|--|-------------|---------------------|
| Excess profits net income..... | | \$1,308,288.34 |
| Less: Specific exemption..... | \$ 5,000.00 | |
| Excess profits credit (as claimed)..... | 516,211.95 | |
| Unused excess profits credit ad- justment (as claimed)..... | 324,929.80 | 846,141.75 |
| Adjusted excess profits net income..... | | <u>\$462,146.59</u> |

COMPUTATION OF EXCESS PROFITS TAX

| | | |
|--|--------------|---------------------|
| Adjusted excess profits net income..... | | \$462,146.59 |
| Excess profits tax: 90% of \$462,146.59 | \$415,931.93 | |
| [Limitation under section 710(a) (1)(B) not applicable] | | |
| Less: Credit for debt retirement.... | 41,593.19 | |
| Correct excess profits tax liability..... | | <u>\$374,338.74</u> |
| Excess profits tax assessed: | | |
| Original, acct. No. 401072..... | | 339,367.51 |
| Deficiency of excess profits tax..... | | <u>\$ 34,971.23</u> |

Received and filed May 8, 1945. [13]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a) to (d), inclusive. Admits the allegations contained in subparagraphs (a) to (d), inclusive, of paragraph 5 of the petition.

5(e) to (g), inclusive. Denies the allegations contained in subparagraphs (e) to (g), inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied. [14]

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

H. A. MELVILLE,
Special Attorneys,
Bureau of Internal Revenue.

HAM/ma 6/12/45.

Received and filed June 20, 1945. [15]

The Tax Court of the United States
Docket No. 7959

CENTRAL INVESTMENT CORP.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Los Angeles, California, November 5, 1946
2:00 P.M.

(Met pursuant to notice.)

Before: Honorable Samuel B. Hill,
Judge.

Appearances:

Joseph D. Brady, 631 Title Insurance Building,
433 South Spring Street; Thomas R. Dempsey,
1104 Pacific Mutual Building, 523 West Sixth
Street, Los Angeles, California, appearing for the
Petitioner.

H. A. Melville (Honorable J. P. Wenchel, Chief
Counsel, Bureau of Internal Revenue), appearing
for the Respondent. [18]

Proceedings

The Clerk: Docket No. 7959, Central Invest-
ment Corporation.

Mr. Brady: Ready for the Petitioner, your
Honor.

The Court: Announce your appearances.

Mr. Brady: Mr. Reporter, will you kindly note the appearances for the Petitioner of Thomas R. Dempsey, who is here; of Joseph D. Brady, now speaking; of Elmo H. Conley and John O. Paulston, who are absent but who will contribute in the writing of the briefs.

Mr. Melville: H. A. Melville for the Respondent.

Opening Statement on Behalf of the Petitioner
By Mr. Brady

Mr. Brady: If your Honor please, this case involves an asserted deficiency in the taxpayer's excess profits taxes for the calendar year 1943 in the amount of \$34,971.23. Now, this asserted deficiency is entirely attributable to the Commissioner's disallowance of a deduction of \$43,174.36 which the taxpayer took in its return for the taxable year 1943, representing the amount of its California franchise tax based upon its net income for this same taxable year, the calendar year 1943.

Now, under applicable California statutes, your Honor, that franchise tax of \$43,174.36 accrued and became a lien on December 31, 1943. The taxable year that we are talking about. The taxpayer set up a liability for that [19] amount on its books of account, which were kept on the accrual basis, on December 31, 1943. The taxpayer paid that state franchise tax of \$43,174.36 in full during the year 1944 when it became due and payable. The taxpayer never questioned or disputed its liability for any part of that tax, has never filed any claim for

refund with respect thereto. As I say, in the return for this taxable year, the taxpayer deducted the amount of that franchise tax. The Commissioner disallowed the deduction, explaining his disallowance in the statement attached to the deficiency notice in the following language, which I should like to quote:

“California State franchise tax paid during the year 1944, amounting to \$43,174.36, treated as a deduction on your return for the calendar year 1943 is disallowed, since it is held that such taxes are properly allowable and deductible during the calendar year 1944 under section 23(c) of the Internal Revenue Code.”

Now, the deficiency notice was mailed March 21, 1945. Presumably the disallowance was based upon I.T. 3646, promulgated early in 1944 by the Commissioner and now reported in 1944 Cumulative Bulletin, page 104. I have a copy of I.T. 3646 and shall be glad to file it with the Court if that would be a convenience to the Court.

The Court: It would be a convenience. We can get [20] it, but if you have an extra copy, you might just as well put it in the file here.

Mr. Brady: Now, as your Honor will observe from reading that I.T., the controversy between the parties here narrows down to the question whether the liability of \$43,174.36 to the State of California accrued on December 31, 1943, our taxable year, as the Petitioner contends it is, or one day later, namely, January 1, 1944, as the Commissioner in that I.T. contends it did.

Now, the petitioner, Central Investment Corp., owns the Biltmore Hotel here in Los Angeles. Under the applicable California statute—which is the very Franchise Tax Act which imposed this tax of \$43,174.36—a lien in favor of the State of California attached to the real estate of this taxpayer on December 31, 1943. The Petitioner contends that under correct construction of the Internal Revenue Code it was obligated to accrue that liability on December 31, 1943, the date on which the lien of the State of California attached to that real property.

Now, in the opinion of counsel for the Petitioner, your Honor, the facts admitted—pleaded in the petition and admitted in the Respondent's answer—are all of the facts necessary to enable this Court to determine the single question of law at issue in this case. The answer denies some of the allegations of the petition, some of the allegations [21] of fact in the petition, but counsel for the Petitioner do not believe those allegations so denied are material. The Petitioner, therefore, does not desire to offer any evidence but reserves the right, of course, to determine at the close of the Respondent's evidence whether or not the Petitioner will offer any evidence in rebuttal.

For the convenience of the Court I should like to hand your Honor a statement of the facts admitted by the pleadings. These facts are very brief. These facts are stated literally in the language of the petition.

Just one thing further, your Honor. I have here an extra copy of an official print by the California

State Printer in 1943 of the California Bank and Corporation Franchise Tax Act as amended in the year 1943. That is the statute which your Honor will have to apply in the determination of this question. Mr. Melville, I believe, has another copy of that same print, and it occurred to the Petitioner that it might be a convenience for the Court to have that in its file.

That is all, your Honor.

The Court: Does the Respondent care to make a statement?

Mr. Melville: Yes, your Honor. [22]

Opening Statement on Behalf of the Respondent
By Mr. Melville

Mr. Melville: The California Bank and Corporation Franchise Tax is imposed, assessed and collected from corporations for the privilege of doing business within the state for the taxable year to be computed upon the basis of the corporation's net income for the next preceding year. Now, because there was a slight amendment or two to that tax law as originally passed in 1929, which amendments occurred in 1943, the controversy in this case arose.

Under the prior law the tax accrued on the first day of the corporation's taxable year, the year for which it was paying for the privilege of doing business. Under the amendment the law, for reasons which we need not go into at this time, was changed so that it provides that the tax accrues on the last year—or the last day of the income year;

that is, December 31st of the year on which the income of which the tax is based, but the day prior to the beginning of the year during which the corporation is going to do business and for the privilege of which it is going to pay this franchise tax.

Now, the accrual date for Federal income tax purposes of this California Franchise Tax prior to the 1943 amendments was the subject of the following published rulings by the Bureau of Internal Revenue: [23]

I.T. 2770, C.B. 13-1, page 111, issued in 1934; I.T. 2971, C.B. 15-1, page 107, issued in 1936; I.T. 2988, C.B. 15-2, page 179, also issued in 1936.

Subsequent to the amendments in 1943, the question was again put up to the Bureau of Internal Revenue and again the accrual date for Federal income tax purposes of this California Franchise Tax was passed upon and a ruling published as I.T. 3646 appears in the Cumulative Bulletin 1944 at page 104.

This proceeding, your Honor, was brought to test the correctness of that ruling of the Bureau. I would like to point out that the importance of this case should not be judged from the amount of tax involved, the stable activities of the Petitioner which, as Mr. Brady has pointed out, is running the Biltmore Hotel, nor the willingness of the Petitioner's counsel to submit this case on the pleas. This, as I have indicated, is a test case and the importance of it is more readily indicated by the fact that three or four separate law firms appear on the petition. These law firms in turn, I under-

stand, have as their clients large manufacturing companies, principally in the aviation industry, which during 1943 had rather large incomes, and the importance to them I can indicate by pointing out that in our case by the simple disallowance of a deduction of \$43,000-and-some-odd dollars, a deficiency in Federal tax of \$34,000.00 arises. [24]

Because of these facts it is our belief that this test case will control the matter of perhaps millions of dollars of Federal revenue which will stand or fall on the basis of this one decision.

The Court: The Petitioner desires to offer no evidence at this time. Does the Respondent have any witnesses?

Mr. Melville: Mr. Freese, will you take the stand, please?

Whereupon,

HARRY R. FREESE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Harry R. Freese, 410 North Edin-burgh, Los Angeles.

Direct Examination

By Mr. Melville:

Q. Mr. Freese, what is your occupation?

A. I am district franchise tax auditor with the State of California, Franchise Tax Commissioner's office.

(Testimony of Harry R. Freese.)

Q. Does the Franchise Tax Commissioner's office have jurisdiction over the California Franchise Tax? A. Yes, sir. [25]

Q. Does it have jurisdiction over any other kind of taxes?

A. Yes, we are the administrative office for the Bank and Corporation Franchise Tax Act, the Corporation Income Tax Act, and the Personal Income Tax Act.

Q. You mentioned a corporation income tax. State, Mr. Freese, if you will, whether corporations in California are subject to both the income tax and the franchise tax.

A. No. Some corporations are subject to one act and some to the other. Corporations are not subject to both acts at the same time.

Q. What determines which act they are subject to?

A. Well, those corporations which, in accordance with the definitions which we have in our act that are doing business in the state, actively engaged in business, are subject to the Bank and Corporation Franchise Tax Act. Those corporations in general which are merely deriving income from the state but not actively engaged in business, such as for example, personal holding companies, are subject to the Corporation Income Tax Act.

Q. State whether or not, then, it is a true state-ment to say that the Franchise Tax is an excise tax imposed on corporations for the privilege of doing business in the State of California during the taxable year.

(Testimony of Harry R. Freese.)

Mr. Dempsey: I object, if your Honor please. It [26] calls for a legal conclusion of the witness.

The Court: I suppose it would appear from the act itself what the provisions are in that regard. This is calling for this witness' interpretation of what the act means.

Mr. Melville: I must admit that that is true, your Honor. I didn't think opposing counsel would dispute that point. They apparently intend to, though, and I will have to admit the act will speak for itself.

Do we want to confuse the Court by quibbling here as to whether a franchise tax is for the purpose of doing business or can we admit that?

Mr. Dempsey: We can admit that the tax here in question is a franchise tax levied under the Franchise Tax Act of California for the privilege of doing business. My reason for objecting to the question was that I didn't know what the witness' answer would be. I didn't care to be bound by it.

Mr. Melville: Quite all right. I appreciate your offer to stipulate and it is so stipulated.

With consent of opposing counsel, I offer in evidence a copy of the Bank and Corporation Franchise Tax Act, 1939; that is before the 1943 amendments.

The Court: Admitted.

Mr. Brady: Just a minute there. We have no objection to that being offered in evidence, but we would like to [27] have it understood that the 1943 print that I offered during my opening statement may be admitted in evidence also.

(Testimony of Harry R. Freese.)

Mr. Melville: May I introduce that in evidence, your Honor?

The Court: Yes, you may. I assumed that, at least so far as existing law is concerned, we would take judicial notice.

Mr. Melville: Yes, your Honor. This is for the Court's convenience.

The Court: It doesn't really have to be offered in evidence.

Mr. Melville: I want to show the comparison.

The Court: You can put them in evidence, both of them. Admitted as Respondent's Exhibit A for the one first offered, and what is the second offer?

(The document above-referred to was received in evidence and marked Respondent's Exhibit A.)

Mr. Melville: The 1943 Act, your Honor.

The Court: That is the one that Mr. Brady put in here?

Mr. Melville: Handed you, yes, your Honor.

The Court: Mark that Respondent's Exhibit B.

(The document above-referred to was received in evidence and marked Respondent's Exhibit B.)

The Court: I am just admitting it in evidence [28] simply because it will be convenient to have it here. I think we can take judicial notice of it.

Q. (By Mr. Melville): Mr. Freese, has the Corporation Commissioner issued any regulations under this 1943 Act?

A. You mean the Franchise Tax Commissioner?

(Testimony of Harry R. Freese.)

Q. Yes. A. No, not to my knowledge.

Q. Did he issue any regulations under the 1939 Act?

A. Well, now, when I say no regulations, I mean no codified regulations. There are office rulings and all published.

Q. But no published official regulations?

A. No.

Q. Did the Franchise Tax Commissioner at any time put out a printed leaflet of instructions to corporations to guide them in the preparation of their returns? A. Yes, sir.

Q. I hand you a leaflet and ask you if that is a copy of the instructions or guide to corporations?

A. Yes, sir, that is the leaflet put out to guide new corporations in the computation of their tax.

Q. And this is the closest thing that the Tax Commissioner has put out to a regulation?

A. Yes, sir. [29]

Mr. Melville: If your Honor please, I offer this in evidence.

Mr. Dempsey: We will waive objection to it, but supply us with a copy of it, if you please.

The Court: Admitted as Respondent's Exhibit C.

(The document above-referred to was received in evidence and marked Respondent's Exhibit C.)

Q. (By Mr. Melville): I note, Mr. Freese, that that Exhibit C has a printing date of 1942. Was that republished subsequent to the change in the 1943 Act? A. Not to my knowledge, no, sir.

(Testimony of Harry R. Freese.)

Q. Those instructions are still applicable, then, even under the 1943 amendments?

A. As near as I know, yes, sir.

Q. Mr. Freese, will you give us an illustration of how this corporation franchise tax worked under the prior law in comparison to under the new law? For example, take a foreign corporation which began business, began doing business in California on January 1, 1942 and continued doing business for the entire calendar year 1942. Assume further that the corporation during that year had a taxable net income of \$10,000.00. What would that corporation have to do to comply with the requirements of the law and your office with respect to this corporation franchise tax? [30]

A. Well, when the corporation would qualify, the Secretary of State would require that they pre-pay the minimum franchise tax, which at that time was \$25.00. That would constitute a prepayment of tax for the taxable year 1942. When they filed their return for the income year 1942—I presume that this is on a calendar year basis—they would file the return on March 15th, 1943. At that time you assumed an income of \$10,000.00. Well, at the rate of 4 per cent, we would have two computations of tax. We would have a tax forwards and backwards. We would have one tax of 4 per cent of \$10,000.00, or \$400.00, for the succeeding taxable period. That is the 1943 taxable period.

In addition to that we would have an adjustment of tax for the first taxable period, another \$400.00

(Testimony of Harry R. Freese.)

less the \$25.00 prepayment, or \$375.00, with a return, the amount that would be due would be \$375.00 plus one half of the \$400.00, or \$200.00, that would be. In other words, the total of tax paid on March 15 would be \$575.00. The other \$200.00 would be payable on September 15th.

Q. And that \$575.00 would cover the privilege of doing business for what years?

A. Well, of that, \$375.00 would be an adjustment of tax for the first taxable period, 1942, and it would constitute half of the tax for the 1943 taxable period. The other half of the 1943 taxable tax would be paid on September 15th. [31]

Q. Now, then, assuming that that same corporation continues doing business in the State of California throughout 1943, when did you say it would pay the remaining \$200.00?

A. Well, that has to do with the payment of the tax. That would be due six months after the return, or September 15th. The entire tax is assessed on the return.

Q. Very well. Now, assuming it continued doing business for the entire year 1943, and during that period, or during that year, had another net income of an even \$10,000.00. How would that be handled in your office by the taxpayer and your office?

A. That return would be filed on March 15th, 1944, and if, in your example, you assumed that when they qualified in the State of California in 1942 they commenced to do business immediately,

(Testimony of Harry R. Freese.)

so that the first income period was a full 12 months, then there would be no further adjustment on the return for 1943 income period, and if they had a \$10,000.00 income during that period, why, the tax would be—the effective rate of the tax for the 1943 income year, I believe, was slightly reduced to 3.4 per cent, effective rate, and the tax would be 3.4 per cent of \$10,000.00, and that would be for the taxable period 1944.

Q. That is for the privilege of doing business in 1944? A. That is correct, yes. [32]

Q. Now, assuming that same corporation continued doing business in California up until June the 30th, 1944, and then ceased doing business in California, whether by withdrawal or by dissolution, what would the tax be?

A. In a situation of that type, if the dissolution or withdrawal was not pursuant to reorganization as defined by our act, why, we would make a refund of a portion of the tax that had been measured by the prior year's income. If it was June 30th, we would make—and it was a calendar year return—we would make a refund and abatement of one half of the tax.

Q. Supposing it went out of business at the end of three months, 1944?

A. Our act provides for a pro-rata by months refund and abatement, and they would be required to pay only one quarter of the tax measured by the prior year's income.

(Testimony of Harry R. Freese.)

Q. And what if it went out of business during the first 15 days of 1944?

A. If it went out of business the first 15 days, any time up to the 15 days, if it did not do business during that first 15 days; that is, it actually ceased doing business, they would be subject to no tax. If they carried on some business during that first 15 days, we would subject them to the minimum tax.

Q. Of how much? [33]

A. At the present time it is twenty-one twenty-five.

Q. Do you mean by that \$21.25?

A. That is correct, 85 per cent of \$25.00.

Q. Do I understand then from your testimony that unless and until a corporation actually does business in the State of California for 16 days or more of the taxable year, no liability for the State Franchise Tax for that year arises?

Mr. Dempsey: If your Honor please, I think that calls for the witness' conclusion. I object.

The Court: Yes. I would rather like to hear the answer to it, though. I will overrule the objection.

The Witness: That is a rather difficult question.

The Court: Well, is it an open and shut proposition, or does it involve doubt?

The Witness: If he means on dissolution, yes. If he means on a beginning corporation that should operate for 15 days, they would be subject to tax. On a dissolution such as he mentioned before, we would subject them only to the minimum \$25.00 tax—or to \$21.25.

(Testimony of Harry R. Freese.)

Mr. Dempsey: Pardon me. I don't understand the question either, apparently. Would it be all right if we start over?

Mr. Melville: I will be glad to start over again.

Q. (By Mr. Melville): Assuming this same corporation, that is, that came into the state, started doing their business on January 1, 1942; it did business all during 1942 and all during 1943. I am just trying to make sure that we understand your testimony. Do I understand correctly that this same corporation now, that unless and until it actually did business for at least 15 days—no, at least 16 days in 1944, it did not become liable for the Corporation Franchise Tax for 1944?

A. Well, I don't know whether it would become liable for the tax. I could not state that. At any rate, we would compute the tax from an administrative standpoint if, as I mentioned before, if in the first 15 days they did no business whatsoever, they were dormant preparatory to dissolving or withdrawing, we would assess no tax whatsoever. If the tax was assessed and they filed returns, we would abate the tax. If, on the other hand, they did engage in some activity, some business activity in the first 15 days, we would assess the minimum tax for that period and collect that.

Q. But that minimum tax is assessed only if the corporation did some business during those 15 days?

A. Yes, that is my understanding of our act.

(Testimony of Harry R. Freese.)

The Court: Just a moment. When do you make the computation? When do you make the assessment as to a current taxable year? [35]

The Witness: Ordinarily it is not until the return is filed. However, on a corporation that is being dissolved or withdrawing, they will be required to file a return before we grant them a tax clearance, and until they have a tax clearance the Secretary of State won't allow them to dissolve or to withdraw.

Mr. Melville: Was that all, your Honor?

The Court: I believe so. Let's see. You are not attempting to answer, as I understand, when the liability might attach?

The Witness: No.

The Court: All right.

Q. (By Mr. Melville): Along that same line, the corporation that does business for the first six months of 1944, let's say, and then withdraws from the state or is dissolved, do they file a return showing their income for those first six months?

A. As a matter of fact, in the situation which you gave, that would not be required because in that computation or the example that you gave there was no second or third year liability attaching, therefore the income for that last six months, we would not require a return on that inasmuch as that would not be used to measure any tax. The tax for that period, 1944, would have been measured by the income for the income year 1943. [36]

(Testimony of Harry R. Freese.)

Q. And the income for 1944, if it had any significance at all, would be with respect to the franchise tax for 1945?

A. That is correct, with the exception, as I noted, of the possibility of adjusting backwards where a full year had not been operated.

Q. Mr. Freese, the returns of corporations filed with your office, are they retained in your office?

A. No. The Sacramento office of the Franchise Tax Commissioner keeps all returns. The only returns sent to Los Angeles are those for field audit and investigation.

Q. Then would the returns of this particular tax payer, the Central Investment Corporation, for 1943, would they be in Sacramento at this time?

A. I don't know where those returns are. I have no specific knowledge.

Q. Are they in your office?

A. I don't know.

Q. Would you explain, please. the mechanics now—take a return from the time it is filed and explain how the assessment and collection of the tax is handled in your office?

A. Well, the returns are filed two months and 15 days after the close of the income year. Those returns can either be filed in Los Angeles, in Sacramento, or in San Francisco. The returns are immediately assessed, the assessed [37] tax is set up as a liability against the corporation, and under our act the corporation, general business corporation, is required to pay one half of the tax with

(Testimony of Harry R. Freese.)

its return and one half of the tax shown six months thereafter. As far as the collection of the tax is concerned if the tax is not completely paid up within, I believe it is 12 months after the close of an income year, a corporation is suspended by the Secretary of State upon the request of the Franchise Tax Commissioner.

Of course collections of tax, the tax is an automatic lien on the real property of the corporation and on the self-assessed tax, and when we have any other additional tax liabilities against a corporation we may go through the lien provisions of our act, in effect a lien of personal property as well as real property.

Q. Your answer to my question was with respect to franchise tax, is that correct? A. Yes, sir.

Q. I just want to make sure of that point that all of my questions and your answers have been with reference to the franchise tax rather than income tax. Is that correct?

A. That is correct, yes, sir.

Q. Now, after the return has been filed and there is an office audit, do you have provision in your organization for investigation and perhaps asserting deficiencies? [38] A. Yes, sir.

Q. Will you explain how that works?

A. Our returns—we have a statute of limitations of four years, and those returns after they are filed are subject to either office audit or to field audit. If we feel that there is a deficiency in tax or a refund, why, we go through the provisions or the

(Testimony of Harry R. Freese.)

actions required by our act. If there is a deficiency, we issue a notice called a notice of proposed assessment, a notice of additional tax, that amounts to. The taxpayers have a right to protest that assertion of a deficiency within 60 days. Then they are entitled to the right of oral hearing and they usually submit a brief on their argument. The oral hearings are held in Los Angeles and San Francisco and in Sacramento. After the Commissioner's determination, after the appeal, he issues a notice of action. If that is not satisfactory to the taxpayer, he may then appeal further to the Board of Equalization or he may pay the tax and go to court and sue on a claim for refund.

Mr. Melville: You may cross-examine.

Mr. Dempsey: No cross-examination.

Mr. Melville: Thank you very much, Mr. Freese.

(Witness excused.)

The Court: Any other witnesses?

Mr. Melville: Yes, your Honor. Is Miss Kruger [39] in Court? Will you take the stand please, Miss Kruger.

Whereupon,

PEARL M. KRUGER

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Pearl M. Kruger, 510 South Spring Street, Los Angeles.

(Testimony of Pearl M. Kruger.)

Direct Examination

By Mr. Melville:

Q. Miss Kruger, what is your occupation?

A. Well, I am secretary of the company, of the Central Investment Corporation.

Q. Are you also treasurer?

A. Yes, secretary-treasurer.

Q. How long have you been working for the Petitioner?

A. Since it was organized in 1922.

Q. And how long have you been secretary-treasurer?

A. Since about January 1945.

Q. Who was secretary-treasurer in 1941?

A. James R. Martin.

Q. 1942? A. James R. Martin.

Q. 1943? [40] A. James R. Martin.

Q. And 1944?

A. Up until about December 23rd, James R. Martin.

Q. Is he now deceased? A. He is.

Q. Do you recognize when you see it the signature of James R. Martin?

A. Yes, I would know it.

Q. Is that also true of F. H. Flint, Jr.?

A. F. W. Flint, Jr., yes, sir.

Q. Miss Kruger, in response to a subpoena of this Court, did you bring with you the corporation's franchise tax returns, Form 105, for the years 1941 to 1944 inclusive, the retained copies?

A. Yes.

(Testimony of Pearl M. Kruger.)

Q. Refer, if you will please, to that return for 1942. When was that filed?

A. It was filed on April 26th, according to our transmittal letter that is enclosed here.

Q. What year? A. 1943.

Q. And for what year did that pay the franchise tax for the privilege of doing business?

Mr. Dempsey: If your Honor please, I think that calls for a legal conclusion of the witness. It will speak [41] for itself.

The Court: Well, what year do you have involved in this particular——

The Witness: It is the Bank and Corporation Franchise Tax return for the year 1942.

Q. (By Mr. Melville): What was the income year there? Does that 1942 refer to the income year or the taxable year?

A. It doesn't say on here.

Q. Well, do you know?

A. I didn't make out the tax returns.

Q. I appreciate that, but as treasurer of your corporation and one who has worked with it ever since it was formed, do you know what the income year involved in that return is?

A. I presume it was 1941.

Mr. Dempsey: Pardon me. May I ask the purpose of this?

Mr. Melville: Your Honor, I want to show during the examination of this witness how this tax affects their Federal tax liability. I want to show by a few questions with respect to 1942, 1943 and

(Testimony of Pearl M. Kruger.)

1944, that in 1943 they get the benefit, if the Court sustains the Petitioner's position in this case, of a double deduction for Federal income tax based upon the payment of the State California Franchise Tax. [42] That is all I wish to establish by this witness.

The Court: I don't know. Ask your question again. The objection was made it calls for a conclusion of the witness. Do you know from the document you have there the correct answer to the question asked you? In other words, is there anything there to indicate the correct answer?

The Witness: No, I don't believe there is.

Q. (By Mr. Melville): What does the year 1942 refer to, Miss Kruger?

A. I would say it is the year on which the tax was computed.

Q. Did you have to file in connection with that a copy of certain items of your corporation Federal income tax return for the year 1942?

A. I would have to examine the return because I have not seen them for some time and I did not make them out.

Q. Maybe I can help you.

A. I presume that is what was done, then.

The Court: Is that answer clear in the record?

Mr. Melville: That answer isn't satisfactory. I think I will introduce in evidence a copy of that return and let it speak for itself and ask leave to substitute a photostatic copy.

The Court: Of the retained franchise tax report of the Petitioner here? [43]

(Testimony of Pearl M. Kruger.)

Mr. Melville: For 1942, yes, your Honor.

Mr. Dempsey: If your Honor please, I object as not being relevant to the question here presented. This is a 1942 return and we have a tax for 1943 in question at this time.

The Court: Overrule the objection. You may offer it. It is admitted as Respondent's Exhibit D.

(The document above-referred to was received in evidence and marked Respondent's Exhibit D.)

The Court: I understand you are going to furnish a photostatic copy?

Mr. Melville: I would like to substitute a photostatic copy.

Mr. Brady: Does that mean the taxpayer will get this back very promptly?

Mr. Melville: I can't be sure how promptly, but as promptly as possible, Mr. Brady. The photostating will be done in Washington, D. C.

Mr. Brady: That is, it will be a month or two?

Mr. Melville: Oh, yes.

Q. (By Mr. Melville): Have you a retained copy of the corporation's franchise tax return for 1943? A. Yes, it is here.

Q. You didn't prepare this? [44]

A. No, our auditors prepare all the tax returns.

Q. When was that filed?

A. On May 5th, 1944.

Q. How much tax was due?

A. \$43,174.36.

(Testimony of Pearl M. Kruger.)

Q. Was that paid, and if so, when?

A. \$22,000.00 of it was paid when the return was filed on May 5th, 1944.

Q. And when was the balance paid?

A. The balance was paid by a transmittal letter dated September 1, 1944.

Mr. Melville: I offer that retained copy of the 1943 franchise tax return in evidence, your Honor.

Mr. Dempsey: No objection.

The Court: Admitted as Respondent's Exhibit E.

(The document above-referred to was received in evidence and marked Respondent's Exhibit E.)

The Court: You desire to substitute a photostatic copy for this also?

Mr. Melville: Yes, if your Honor please.

The Court: You may have that privilege.

Q. (By Mr. Melville): And do you have the corporation's retained copy of the franchise tax return for 1944? A. Yes, I do. [45]

Q. When was that filed?

A. April 13th, 1945.

Q. How much tax was due?

A. \$45,815.23.

Q. And when was that paid?

A. \$23,000.00 of it was paid when the return was filed on April 13th, 1945. The balance was paid on September 5th, 1945, \$22,815.23.

Mr. Melville: If your Honor please, I offer in evidence the corporation's retained copy of the franchise tax return for 1944.

Mr. Dempsey: No objection.

The Court: Admitted as Respondent's Exhibit F.

(The document above-referred to was received in evidence and marked Respondent's Exhibit F.)

Mr. Melville: With permission to substitute a photostatic copy, if I may, please.

The Court: You may have that privilege.

Q. (By Mr. Melville): Miss Kruger, I hand you a Federal corporation income and declared value excess profits tax return for 1942 and ask you if you can identify it from the signatures thereon?

A. Yes. Mr. Flint's signature and Mr. Martin's, and I acknowledged it as a notary public myself.

Q. Can you tell me by referring to the schedule with respect to taxes whether a deduction was claimed for the California Franchise Tax on this 1942 Federal return?

Mr. Dempsey: If your Honor please, I would like to ask the purpose of the question.

Mr. Melville: I want to show how this franchise tax was handled for Federal income tax purposes before, during and after 1943 to show that a double deduction could result from the Court's decision in this case.

Mr. Dempsey: Object to it as being incompetent, irrelevant and immaterial.

(Testimony of Pearl M. Kruger.)

The Court: Overruled.

Q. (By Mr. Melville): Do you have the question in mind, Miss Kruger?

A. There is a deduction for the California Franchise Tax, yes, of \$5,272.34.

Q. Does that correspond with any check that you have in your possession?

A. Yes, we have a check dated March 5th, 1942, for \$5,272.34.

Q. Made payable to whom?

A. To the Franchise Tax Commissioner.

Q. And the date on that?

A. March 5th, 1942.

Mr. Melville: Thank you. [47]

The Court Have you offered that in evidence?

Mr. Melville: No, I have not. I have the information in the record that I wanted to get in.

The Court: Oh, I thought that was what you were objecting to, was the offer in evidence.

Mr. Dempsey: My objection was to the question.

Q. (By Mr. Melville): Miss Kruger, I hand you another document and ask you if from the signatures on that document you can identify it?

A. Yes, that is Mr. Flint's signature and Mr. Martin's signature with my signature as a notary public.

Q. And what is the document?

A. It is the United States corporation income and declared value excess profits tax return for the calendar year 1943.

(Testimony of Pearl M. Kruger.)

Q. And I direct your attention to the schedule setting forth the taxes and ask you to read into the record the second and third items, including the amounts.

A. "California Franchise Tax for the year 1943, \$19,736.60; California Franchise Tax for the year 1944, \$43,174.36."

Q. Do you have in your possession any checks which correspond with those figures?

A. Not those specific figures, no. [48]

Q. Was the amount of \$19,736.60 paid?

A. It was paid, yes.

Q. Do you have the checks to substantiate the payment?

A. There are a couple of checks here, one dated April 26th, 1943, and one dated September 7th, 1943, the total of which would probably amount to \$19,736.60.

Q. Would you mind adding them up and be more positive about your testimony?

A. I would have to have a pencil.

Q. I will be glad to furnish you one.

A. I get \$19,804.04, but one of them includes an item of interest of \$67.44. I suppose when that is deducted, \$67.44, it will be the amount of the tax, \$19,736.60—yes.

Q. And the dates of those checks and the amounts again?

A. April 16, 1943, \$9,935.74. That is tax. \$9,868.30 plus interest, \$67.44. The second check is dated September 7th, 1943, for \$9,868.30.

(Testimony of Pearl M. Kruger.)

Q. Thank you. Now will you identify the checks, please, together with the dates and amounts which substantiate your payment of \$43,174.36?

A. Well, there is a check dated March 13th, 1944, for \$22,000.00, one dated September 1, 1944, for \$7,000.00, another dated September 1, 1944, for \$9,000.00, and another [49] one dated September 1, 1944, for \$5,174.36. The total of those checks is \$43,174.36.

Mr. Melville: No more questions.

The Witness: Do I take these with me?

The Court: The lady was asking about these documents.

Mr. Melville: I have introduced in evidence, your Honor, everything from her documents that I want in.

The Witness: Then I take them with me?

Mr. Melville: Yes.

The Court: Have you any questions of this witness?

Mr. Dempsey: No questions.

The Court: Any further witnesses?

Mr. Melville: One moment, please, your Honor. I have no more witnesses but I want to consider one more point.

Mr. Brady: If your Honor please, may I ask Miss Kruger just one question?

The Court: Yes.

(Testimony of Pearl M. Kruger.)

Cross-Examination

By Mr. Brady:

Q. Miss Kruger, do you know how many stockholders the Central Investment Corporation had on December 31, 1943?

A. Well, I would say it was around 650 or something like that. [50]

Q. How many outstanding shares did it have on that date? A. 58,563 shares.

Mr. Brady: That's all.

(Witness excused.)

Mr. Melville: Your Honor, I am offering in evidence the Federal corporation excess profits tax return for the taxable year involved in this proceeding; that is, for the calendar year 1943, and ask leave to substitute a photostatic copy.

Mr. Dempsey: No objection.

The Court: Admitted as Respondent's Exhibit G.

(The document above-referred to was received in evidence and marked Respondent's Exhibit G.)

Mr. Melville: The Government rests.

Mr. Dempsey: The Petitioner rests.

Mr. Brady: The Petitioner rests, your Honor.

The Court: Both parties rest. You may have 45 days for simultaneous briefs and 15 days for answering briefs.

Mr. Melville: Thank you, your Honor.

Mr. Brady: If your Honor please, we have our brief written. We can file it in 15 days, if you would like to have us open, with Respondent replying to that, and our replying. [51]

Mr. Melville: I am satisfied with the rule of the Court that we file simultaneous briefs within 45 days. If Mr. Brady gets his in in 15 days, why, then he is not rushed.

The Court: It gives you a chance to answer his brief. There might be some advantage to you in that.

Mr. Melville: May I have 45 days to answer, your Honor? I am thinking about other cases I have.

Mr. Brady: I will file the brief in Washington 15 days from today's date, your Honor.

The Court: I am not trying to force you into something. If you want simultaneous briefs, it is all right with me.

Mr. Melville: I am perfectly willing to file either simultaneous briefs in 45 days or reply to his brief in 45 days after I receive service.

The Court: Make them simultaneous briefs in 45 days and the answers in 15 days.

Mr. Brady: How much for the reply briefs?

The Court: 15.

Mr. Brady: We can't handle it with six days each way in transportation.

The Court: How about 30 days?

Mr. Brady: 30 days would be better.

The Court: 45 days for simultaneous briefs and 30 days for reply briefs. [52]

Mr. Melville: Thank you.

(Thereupon, at 3:00 o'clock p.m., Tuesday, November 5, 1946, the hearing in the above-entitled matter was closed.)

Filed Nov. 27, 1946. [53]

The Tax Court of the United States

9 T. C. No. 17

Docket No. 7959

CENTRAL INVESTMENT CORPORATION

(a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Promulgated July 30, 1947

California franchise tax imposed for the privilege of doing business during 1944, which tax is measured by income realized in 1943, held, to accrue and be deductible for Federal tax purposes in 1944.

Joseph D. Brady, Esq., and Thomas R. Dempsey, Esq., for the petitioner.

H. A. Melville, Esq., for the respondent.

FINDINGS OF FACT AND OPINION

Respondent determined a deficiency in petitioner's excess profits tax liability for the calendar year 1943 in the amount of \$34,971.23. The deficiency results from the disallowance of a deduction in the amount of \$43,174.36 on account of California franchise tax. The question is whether the California franchise tax is deductible in 1943, as petitioner contends, or in 1944, as respondent contends. Petitioner's excess profits tax return [54] for the calendar year 1943 was filed with the collector of internal revenue for the sixth district of California on the accrual basis, which basis clearly reflects its income. The case was submitted on oral testimony and exhibits.

Findings of Fact

Petitioner is a California corporation organized October 6, 1921, with its principal offices located in Los Angeles, where it owns the Biltmore Hotel. At no time material hereto did petitioner have any pending negotiations for the possible sale of its Biltmore Hotel property or contemplate dissolution or liquidation.

In 1929 the California Legislature enacted the Bank and Corporation Franchise Tax Act, Chapter 13, Laws of 1929, hereinafter referred to as the Act. Petitioner is and has been subject to the Act as a corporation as defined in such Act. The Act, as amended in 1943 in section 4(3), provides that corporations doing business in California and not

otherwise exempt “shall annually pay to the State, for the privilege of exercising its corporate franchises * * *, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually to the State, for the said privilege, a minimum tax of twenty-five dollars (\$25).”

Section 11 provides in part that:

Sec. 11. Definitions. (a) The term “income year,” as herein used, means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed herein. “Income year” includes, in the case of a return made for a fractional part of a year, the period for which such return is made.

(b) The term “taxable year,” as herein used, means the calendar year, or the fiscal year ending during such calendar year, for which the tax is payable. A “taxable year” may constitute a period of 12 months or of less duration.

Section 4(7) provides that:

(7) Accrual date. Taxes under this section and under Sections 1 and 2 of this act shall accrue on the last day of the “income year,” as defined in Section 11 hereof.

Section 29(a) provides in part that:

The taxes imposed by this act and disclosed on the return shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien and shall attach on the last day of the "income year," * * *

Prior to the 1943 amendment of the Act, the Act provided that the tax accrued and the lien therefor attached on the first day of the taxable year.

Section 13 of the Act requires every corporation subject to the tax to file a return within two months and fifteen days after the close of its income year.

Section 23 provides in part that:

* * * * *

Corporations. In the case of corporations of the classes referred to in subdivision (3) of section 4 of this act, one-half the amount of tax disclosed by the return shall be due and payable as a first installment of the tax on such corporations on or before the fifteenth day of the third month following the close of the income year, as defined in section 11 hereof. The balance of the tax shall be due and payable as a second installment on or before the fifteenth day of the ninth month following the close of the income year. A tax imposed by this act or any installment thereof may be paid at the election of the taxpayer, prior to the date prescribed for its payment. [56]

Various subparagraphs of section 13 of the Act deal with the computation of the franchise tax in situations wherein corporations are commencing business in their first taxable year or are withdrawn or dissolved within the taxable year. In the case of commencing corporations it is provided in general that the tax for the first taxable year shall be based on the income of such year and paid during the second year. With respect to corporations withdrawing or dissolving during the taxable year it is provided in general that the tax for such taxable year be reduced on account of the portion of such year during which the taxpayer does not do business in California.

For the privilege of doing business within the state during the calendar year 1943 the petitioner duly filed on April 26, 1943, with the Franchise Tax Commissioner of the State of California the franchise tax return required by Section 13 of the Franchise Tax Act. This franchise tax return disclosed petitioner's gross and net incomes for the calendar year 1942 and a franchise tax liability of \$19,736.60, which was paid by two checks—one dated April 16, 1943, for \$9,868.30 and the other dated September 7, 1943, for \$9,868.30.

For the privilege of doing business within the state during the calendar year 1944 the petitioner on May 5, 1944, duly filed with the Franchise Tax Commissioner of the State of California the franchise tax return required by Section 13 of the aforesaid Franchise Tax Act, as amended. This franchise tax return disclosed petitioner's gross and net

income for the calendar year 1943, in the amounts of \$1,957,323.27 and \$1,206,923.17, respectively, and disclosed a franchise tax liability of \$43,174.36. The tax was imposed by Section 4(3) of the Franchise Tax Act and was determined, as provided in that section, "according to or measured by" the net income of petitioner for the calendar year 1943, to-wit, \$1,206,923.17, and was correctly computed at the effective statutory percentage rate applicable to the net income. The tax of \$43,174.36 was set up on petitioner's books of account as a liability as of December 31, 1943, before the closing of such books for the calendar year 1943, and was duly paid by petitioner to the Franchise Tax Commissioner as follows: \$22,000 by check dated March 13, 1944, and \$21,174.36 by three checks all dated September 1, 1944. The petitioner has never at any time disputed its liability for the whole or any part of such tax, has never filed any claim for refund or credit for the whole or any part thereof, and has never had, and does not now have, any intention of filing any such claim.

In filing its Federal income and excess-profits tax returns for the calendar year 1943 the petitioner claimed deductions not only for the California franchise tax imposed for the privilege of doing business in the state during 1943 in the amount of \$19,736.60 but also for the California franchise tax imposed for the privilege of doing business in the state during 1944 in the amount of \$43,174.36.

Respondent, in his statement accompanying the deficiency notice with respect to 1943 stated: [58]

California State franchise tax paid during the year 1944, amounting to \$43,174.36, treated as a deduction on your return for the calendar year 1943 is disallowed, since it is held that such taxes are properly allowable and deductible during the calendar year 1944 under section 23(c) of the Internal Revenue Code.

Opinion

Hill, Judge: The problem for our determination is whether the California franchise tax imposed for the privilege of doing business during 1944 is deductible for Federal tax purposes in 1944, as respondent contends, or is deductible in 1943, the year giving rise to the income which furnishes the measure for the tax, as petitioner contends.

California imposes a tax on corporations for the privilege of doing business in the state during a given year, which year of privilege is designated the "taxable year." The tax so imposed is, with certain exceptions not here material, a percentage of the income of the preceding year, which preceding year is designated the "income year." Prior to 1943 the tax by the terms of the Act accrued and a lien therefor attached on the first day of the "taxable year." By amendment in 1943 it was provided that the tax accrued and a lien therefor attached on the last day of the "income year." It is this amendment which gives rise to the present problem.

Petitioner, being on an accrual and calendar year basis, contends that the franchise tax imposed for the privilege of doing business in 1944, the "taxable year," by its own terms accrued December 31, 1943,

and a valid lien under local law attached at that time. Petitioner argues from this that such tax was properly accrued and deducted by it in 1943 for Federal tax purposes. [59]

Petitioner's argument relies heavily on the fact that a valid lien under local law attaches on the last day of the "income year." Petitioner then cites the following cases which petitioner interprets as standing for the proposition that the proper date to accrue liability for taxes, for purposes of deduction under section 23(c), Internal Revenue Code, is the date when the lien to secure the payment of such taxes attaches, even though the taxes have not yet been assessed and are not yet due and payable. *Magruder v. Supplee*, 316 U. S. 394; *California Sanitary Co. Ltd.*, 32 B. T. A. 122; and *Crown-Zellerbach Corp.*, 43 B. T. A. 541. These cases are not considered applicable to the instant situation. These cases involved generally the question of who was liable for local property taxes as between transferor and transferee. In *Magruder v. Supplee*, *supra*, for instance, the taxpayer-vendee purchased real property on May 10, 1936. In January, 1936, the local taxes became due and payable on the property for the taxable year 1936 and a lien attached therefor at that time. The vendor was the one against whom the taxes were assessed and he became personally liable therefor prior to the sale. It was held that the vendee-taxpayer could not deduct in 1936 any local taxes paid by him on account of the property since he was not liable therefor. In *California Sanitary Co. Ltd.*, *supra*, was involved

the California property tax which provided that property must be assessed for local tax purposes "to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian of the first Monday in March * * *." A lien attached for the taxes at that time. We held that the taxpayer who acquired property subsequent to the lien date was not entitled to deduct taxes paid by him for that year on the [60] property because the transferor owning the property on the crucial date had become liable therefor. *Crown-Zellerbach, supra*, is essentially similar in principle to the California Sanitary case. None of these cases, in our opinion, is controlling of the question at hand because these cases involve property taxes, the personal liability for which arises by virtue of ownership at a specified time. A transfer of the property subsequent to the existence of a personal liability for the taxes thereon has no effect on such liability. In these cases the personal liability for the taxes as of the specified day of ownership and the lien attaching therefor arise simultaneously and no subsequent events can control or alter the liability therefor, despite the fact such taxes may be considered as covering a taxable period subsequent to the existence of the liability. In this connection the Supreme Court in *Magruder v. Supplee, supra*, said that real estate taxes "are not like rent, nor are they paid for the privilege of occupying property for any given period of time." The nature and character of the franchise tax here in question is essentially differ-

ent from the property taxes involved in the above discussed cases. The franchise tax is imposed for the privilege of doing business during the "taxable year." It is true that such tax is measured by the preceding year's income but it is not an income tax on such income but rather an excise tax for the privilege of doing business in the "taxable year" subsequent to the "income year." That the tax is essentially a tax on the privilege of doing business in the "taxable year" is clear from the terms of the Act and further from the fact that withdrawal or [61] dissolution relieves the taxpayer from taxation for the period of the "taxable year" during which the franchise privilege is not exercised. Therefore, on the last day of the "income year" we are unable to see how any liability can arise for a tax imposed on the privilege of doing business for a year not yet commenced. It is true that on the last day of the "income year" the facts are available which may constitute one of the basic elements of the prospective tax computation and it may also be that then it may seem almost inevitable that some liability will arise by virtue of the next day being the first day of the "taxable year." But however inevitable its prospective existence may seem on the last day of the "income year," the tax being for the privilege of doing business in the taxable year, the liability therefor arises only with and from the exercise of such privilege. If no business operations were carried on in the taxable year the tax would not be imposed.

In the instant case the franchise tax for the

privilege of doing business in 1943 was properly taken and allowed as a deduction in petitioner's tax return for 1943, the year before us. The tax here in question was imposed on the privilege of doing business in 1944 and not in 1943. We think it is not open to argument that the obligation to pay this tax was an expense of petitioner's business operations in 1944. It was, therefore, an expense which must necessarily be taken into account in the tax year 1944 in order properly to reflect petitioner's net income in that year. A business expense incurred which is attributable to the business operations of a particular tax year or period is, for the purpose of the Federal income tax, accruable in such year. *U. S. v. Anderson, et al.*, 269 U. S. 422; *Petaluma & Santa Rosa R.R. Co.*, 11 B. T. A. 541; *H. H. Brown Co.*, 8 B. T. A. 112; *Durst Productions Corporation*, 8 T. C. No. 158 (promulgated June 27, 1947). [62]

In the *Anderson* case, referring to the right to keep books and make income tax returns on the accrual basis, the Supreme Court said:

* * * It was to enable taxpayers to keep their books and make their returns according to scientific accounting principles, by charging against income earned during the taxable period, the expenses incurred in and properly attributable to the process of earning income during that period; and indeed, to require the tax return to be made on that basis, if the taxpayer failed or was unable to make the return on a strict receipts and disbursements basis.

(2) The appellee's true income for the year 1916 could not have been determined without deducting from its gross income for the year the total cost and expenses attributable to the production of that income during the year.

The Petaluma & Santa Rosa R. R. Co. case involved accrual date of the California franchise tax on public utilities measured by a certain percentage of the gross receipts on account of business done during the last preceding tax year. Sections of the California Code applicable were 3664a, 3665a, 3668, 3668b and 3668c as they existed in the years there involved. Petitioner contended that the franchise taxes which were assessed and became due and payable in 1921 were deductible in 1920 upon the theory that they were based upon the earnings of the prior year. The tax year there involved was 1921. We held that "a consideration of the statute leads us to to conclusion that there was no liability for the 1921 tax created by any events which occurred in 1920. If the corporation did not own the franchise and other property in 1921 there was not liability for the tax for that year, although the measure existed by which it could have been determined, if there was any liability. The 1921 tax was an expense of the business for that year and not for the prior year and it can not be deducted in the prior year as an accrued liability." The California statute [63] provided that the franchise tax there in question became a lien on the property involved on the first Monday of March of the tax year.

In the H. H. Brown case we said:

The basic idea under the accrual system of accounting is that the books shall immediately reflect obligations and expenses definitely incurred and income definitely earned without regard to whether payment has been made or whether payment is due. Expenses incurred in the operations for a particular year are properly accrued in the accounts for that year, although payment may not be due until the following year.

Article 9A of New York Consolidated Laws, involved in the case of Durst Productions Corporation, imposes a corporation franchise tax each year for the privilege of doing business in that State. The tax is measured by a stated percentage of the "entire net income" of the year for which the tax is imposed but it is payable and a lien therefor attaches in a subsequent taxable year. In the Durst case we said: "The tax being calculated on the amount of earnings for the year in issue its charge against those earnings seems to accord with the theory of accrual."

Nor do we think that the wording of the Act to the effect that the tax accrues and the lien therefor attaches on the last day of the "income year" alters the situation. These provisions of the Act, in our opinion, only have significance in terms of priority of liens, and do not affect the question of accrual for Federal tax purposes. Since the provisions of the Act, specifying the last day of the "income year"

as the time of accrual and as the lien date, are for a special and limited purpose only i.e., priority of liens, and has reality in this connection only as it relates back from a delinquency occurring in the "taxable year," we do not think such provisions can be considered determinative of the question before us. [64]

Respondent has ruled that the California franchise tax before us is deductible for Federal tax purposes in the "taxable year." I.T. 3446 C. B. 1944, p. 104. This ruling to us seems proper and is consistent with the treatment accorded other state franchise taxes.¹ For the reasons above indicated we hold that the California franchise tax for 1944 accrued for Federal tax purposes in 1944 and was deductible in that year rather than 1943.

Decision will be entered for respondent.

[Seal]

¹Illinois, I.T. 3186, C.B. 1938-1, p. 140; Kentucky I.T. 3232, C.B. 1938-2, p. 70; Maryland, I.T. 3192; C.B. 1938-1, p. 144; Massachusetts, G. C. M. 22525 C.B. 1941-1, p. 350; Michigan, I.T. 3047, C.B. 1937-1, p. 66; Oklahoma, I.T. 3136, C.B. 1937-2, p. 100; Pennsylvania, I.T. 3189, C.B. 1938-1, p. 141; Tennessee, I.T. 3150 and 3151, C.B. 1938-1, pp. 125, 126. The Connecticut tax has been ruled to accrue on the last day of the "income year," I.T. 2935, C.B. XIV-2, p. 91, but it is difficult to determine from reading the state statute (chapter 66 b, Cumulative Supplement to Connecticut General Statutes, January sessions. 1931, 1933, 1935) whether the tax is imposed for the privilege of doing business during the "income year" or the "taxable year." See in this connection "Deductions for Accrued Taxes." 14 Taxes 197.

The Tax Court of the United States

Docket No. 7959

CENTRAL INVESTMENT CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated July 30, 1947, it is Ordered and Decided: That there is a deficiency in excess profits tax for the calendar year 1943 in the amount of \$34,971.23.

[Seal] /s/ EUGENE BLACK,
Judge.

Entered: July 31, 1947.

[Title of Tax Court and Cause.]

MOTION FOR REVIEW BY THE COURT OF
REPORT OF A DIVISION (JUDGE HILL)

To the Presiding Judge of the Tax Court of the
United States:

Petitioner respectfully prays that the Presiding Judge exercise the discretion conferred on him by Section 1118(b), I.R.C., and direct that the de-

cision promulgated in the above proceeding on July 30, 1947, be set aside and that the matter be reviewed by the entire Court.

The sole issue is as to whether the California franchise tax imposed for the privilege of doing business during 1944, but measured by income realized in 1943, accrued and became deductible for federal tax purposes in 1943 or in 1944.

This petition for review is based upon the [67] grounds——

(1) that the question involved is one of importance to all corporate taxpayers who have paid California franchise taxes for any taxable year ending after May 7, 1943, and

(2) that the decision promulgated herein on July 30, 1947, contains important errors which should not be permitted to remain uncorrected by this Court.

(1) Importance of Question.

This case is one of first impression, so far as the particular tax is concerned. As the opinion of Judge Hill points out, the California statute imposes a tax on corporations for the privilege of doing business in the state during a given year designated as the “taxable year,” the tax being measured, however, by the income of the preceding year, which is designated the “income year.” Prior to May 7, 1943, the tax, by the terms of the California Bank and Franchise Tax Act (hereinafter referred to as the Act), accrued and became a lien on the first day of the “taxable year,” but, by an

amendment which became effective on that date, it was provided that the tax accrued and became a lien on the last day of the "income year." Thus, with respect to all taxable years ending on or after May 7, 1943, the problem presented in the present case arises as [68] to all corporations doing business in California and keeping their books and making their returns on the accrual basis. The Commissioner has ruled (I. T. 3446, C. B. 1944, page 104) that, notwithstanding the 1943 amendment, the California franchise tax is deductible for federal tax purposes in the "taxable year" of the corporation. The present case, however, is the first proceeding before any court involving the effect of the 1943 amendment and the propriety of said ruling by the Commissioner. The importance in terms of the number of corporations involved and the amount of taxes involved is indicated by the Bank and Corporation Franchise Tax Statistics of 1943 Returns published by the California Franchise Tax Commissioner on March 1, 1945, wherein it is stated that 13,904 corporations filed California franchise tax returns for the "income year" 1943 and paid taxes aggregating in excess of \$63,000,000. Unquestionably, at least as many corporations paid at least as much tax in each of the succeeding years.

(2) Important Errors in Opinion.

The decision promulgated on July 30, 1947, should be reviewed by the entire Court, also, in order to correct certain patent errors therein.

(a) Effect of Local Law Accrual Provisions.

The basic error involved in the decision is the

conclusion or assumption by the Trial Judge that the case is one which calls for a determination as to the proper date of accrual of the franchise tax according to the nature of that tax and without regard to the express provisions of the Act specifying a date as of which liability therefor shall accrue and as of which a lien in support of such liability shall attach to the property of the taxpayer. Thus, the only mention in the opinion of the statutory provisions in regard to the accrual and lien date (other than the reference, at page 6, to the fact that the petitioner relies upon such provisions) is the following statement at page 11 of the opinion:*

“Nor do we think that the wording of the Act to the effect that the tax accrues and the lien therefor attaches on the last day of the ‘income year’ alters the situation. These provisions of the Act, in our opinion, only have significance in terms of priority of liens, and do not affect the question of accrual for Federal tax purposes. Since the provisions of the Act, specifying the last day of the ‘income year’ as the time of accrual and as the lien date, are for a special and limited purpose only, i.e., priority of liens, and has reality in this connection only as it relates back from a delinquency occurring in the ‘taxable year’, we do not think such provisions can be considered determinative of the question before us.”

*This reference is to the mimeographed copy of the opinion sent to counsel by the Clerk.

Reading the balance of the opinion with this last-quoted statement in mind, it is evidence that the Trial Judge was merely determining when the franchise tax would have accrued if there had been no provision at all in the statute with respect to an accrual date or a lien in support of the tax. Thus, at pages 8 and 9 of the Opinion, the Court considers the nature and character of the franchise tax and concludes, on the basis of such study, that "Therefore, on the last day of the 'income year' we are unable to see how any liability can arise for a tax imposed on the privilege of doing business for a year not yet commenced." In other words, the Court assumes that the problem presented for decision is what would be the proper date of accrual of the tax, if there were no statutory accrual and lien date. However, regardless of what the Court might discern from its analysis of the nature of the tax, the fact remains that the Legislature of the State of California has expressly provided that the tax shall accrue and become a lien on the last day of the income year. That is how the liability arose which the petitioner herein accrued; it accrued because of the express statutory provisions creating such liability, not because of the nature of the tax. The nature of the tax has nothing to do with the proper accrual date under such circumstances.

It is to be observed that the Trial Judge in [71] effect concedes that the provisions of the Act did at least "have significance in terms of priority of liens." In fact, as shown by the decisions cited and discussed at pages 36 and following of Peti-

tioner's Opening Brief, the provision establishing the lien as of the last day of the income year gives the state a priority as against not only unsecured tax claims of the United States but also as against secured tax claims of the United States, the lien for which attached subsequent to the statutory lien date for the state tax. Thus, in the present case, if the Federal Government had filed a lien on January 1, 1944, the state's lien would have been superior thereto. Necessarily, in order to have this effect, there must have been a liability to be supported by the lien. If there was such liability supported by such a lien, it is difficult to perceive how it can be said that this is without significance for Federal tax purposes. The bare statutory accrual date should suffice to require the accrual on a taxpayer's books in accordance therewith, but here we have, in addition, such a lien in support of the tax as to show beyond reasonable doubt that, in specifying that the liability accrued as of the chosen date, the statute was not creating a meaningless picture.

In regard to the Court's conclusion that the provisions of the Act specifying the last day of the income [72] year as the date of accrual and as the lien date are for a special and limited purpose only, that is, "priority," we merely observe, for the present, that if this were true it is not apparent what object would have been accomplished by changing the accrual and lien date from the first day of the taxable year to the last day of the income year. Manifestly, the Legislature had in mind the effect of such change upon the taxpayers, and was not

merely moving its own priority ahead one day. However, whatever may have been the "purpose" of the Legislature, the fact remains that the statute is in general terms—it does not create liability solely for such purpose, but prescribes without any limitations that the tax shall accrue on the last day of the income year (Sec. 4(7)) and that such liability shall be supported by the lien prescribed in Sec. 29 of the Act. The decision herein will be patently unsupportable if it is allowed to remain, as it is, based upon such a clear misinterpretation of the admittedly controlling local law.

(b) Applicability of principles established
in property tax accrual cases.

The opinion also involves errors in its rejection of the principle, established by certain cases relating to the accrual of property taxes, that taxes accrue when the [73] statutory lien in support thereof attaches.

For example, the opinion purportedly distinguishes the cases of *Magruder v. Supples*, 316 U.S. 394, 29 AFTR 196, *California Sanitary Company, Ltd.*, 32 B.T.A. 122, and *Crown-Zellerbach Corp.*, 43 B.T.A. 541, upon the bare ground that "These cases involve generally the question of who was liable for local property taxes as between transferor and transferee."

It is true that the first two of the cited cases involved the question of who was entitled to a deduction, for federal tax purposes, of property taxes paid by a person who purchased the property and

paid taxes which were a lien before the date of purchase. It is not apparent, however, why this prevents the principle established therein from being applicable to cases involving the deduction of taxes where no transfer of property is involved. In the cases involving the right of a purchaser to deduct the property taxes paid by him, the Courts are merely determining when the liability for the tax accrued. If it accrued prior to the transfer, then, manifestly, it was not the tax of the transferee, and so could not be deducted by him. Conversely, however, it would necessarily follow that in such case the tax would be deductible by the transferor. As pointed out at page 47 of petitioner's opening brief, it is clear that if the tax thus accrues on [74] the lien date for purposes of determining who is entitled to a deduction therefor as between the seller or the purchaser, it must also accrue on the lien date for purposes of determining when it is deductible by a taxpayer on the accrual basis, even if no transfer of the property is involved. In fact, this is in effect the position asserted by the Chief Counsel of the Bureau of Internal Revenue in G.C.M. 21373 (1939-2 C. B., page 82). Furthermore, the Crown-Zellerbach case, also distinguished, as hereinabove noted, by the Court herein, involved simply the question of the proper year for the deduction of property taxes paid by the petitioner therein. No transfer was involved. Clearly, the purported ground of distinguishing these cases is without merit.

The opinion attempts further to distinguish the property tax cases—holding that property taxes accrue when the lien therefor attaches—upon the ground that (Opinion, page 8) “The nature and character of the franchise tax herein is essentially different from the property taxes involved in the above discussed cases.” Of course, this is true in many respects. But the property tax cases were cited for, and support, the proposition that local taxes accrue, for Federal income tax purposes, on the date when there is personal liability therefor, or when the lien therefor attaches, whichever is earlier; and if such date [75] is specified in the local tax law, then it is immaterial that the tax is for a period commencing at a later date, or that at the designated accrual or lien date the taxes have not been assessed, or that the basis for computing the amount of the tax is still unknown (see Petitioner’s Opening Brief, page 46), or even that the tax may in fact subsequently be abated or refunded. (*Id.*, pp. 55-56.) The question is not whether the taxes are similar but whether the statutory provisions as to accrual of liability or as to the attaching of a lien in support of the taxes are similar. If the lien and/or accrual provisions are similar, then the fact that in the absence of such an accrual or lien provision the Court might well conclude that the character of the franchise tax is such that it does not accrue until some later time, is entirely immaterial. Manifestly, the opinion misconceives the problem here presented.

Further, in discussing the nature of the franchise tax involved herein, the Court states that under the terms of the Act withdrawal or dissolution may relieve the taxpayer from taxation for the portion of the “taxable year” during which the franchise privilege is not exercised. (Opinion, pp. 8-9.) As a matter of fact, no dissolution or withdrawal during the “taxable year” would completely relieve the taxpayer of liability for the franchise tax based on the income of the income year. At most, it would reduce the tax to the minimum amount prescribed by the act. [76] (See Petitioner’s Opening Brief, pp. 32-35.) And, in any event, as is more fully discussed in Petitioner’s Opening Brief herein (pp. 55 ff.), “accrual” is not synonymous with or dependent upon absolute certainty of payment of the full amount of the accrued liability. As the Trial Judge herein has, in another recent decision involving the proper time for the deduction of taxes accrued, very clearly pointed out, “The propriety of the accruals must be judged by the facts which petitioner knew or could reasonably be expected to know at the closing of its books for the taxable year * * *.” (Baltimore Transfer Co., 8 T. C. 1 (No. 1), upholding the deduction in the amount accrued, notwithstanding a subsequent reduction in the amount of the tax.) The applicability of the principle thus stated in the cited case to the facts herein is self-evident. Here, in the light of the facts as of the close of the “income year” there was no reasonable possibility of the petitioner not being required to pay in full the

liability which it accrued; and subsequent events have only borne out petitioner's then appraisal of the facts, for the tax in question was in fact paid in full and has never been refunded or abated in any part. (See Petitioner's Opening Brief, pp. 32-35; Petitioner's Reply Brief, pp. 44-45.) Yet the Opinion herein does not even mention the Baltimore Transfer case. This case is more fully discussed in Petitioner's Reply Brief, pages 32-34, and 40-41. Also, in regard to the propriety of accruing taxes which [77] might be affected by certain contingencies, see the decision of the Trial Judge herein in *Louisiana Delta Hardwood Lumber Co., Inc.*, 7 T. C. 994 (No. 116), and the discussion thereof and of other capital stock tax cases in Petitioner's Reply Brief, pages 41-45. It is not apparent how the decision herein by the Trial Judge can be reconciled with his decision in the above cited cases.

(c) Applicability of "expense"-deduction principles.

The Court herein also confuses the problem here presented—which is one of a deduction under I.R.C. Section 23(c) for taxes—with the problems involved in connection with deductions under I.R.C. Section 23(a) for expenses (see Opinion, page 9). The deduction for taxes is for taxes which accrue during the taxable year in question; and where there is a lien, the taxes accrue in the year in which they become a lien, regardless of whether the tax is for that year in the sense that a business

expense has to be for the taxable year. It is squarely so held in the *Crown-Zellerbach* case, *supra*. That case involved, amongst other taxes, property taxes imposed by the State of California. These taxes became a lien on the first Monday in March but were levied for and paid in the State fiscal period commencing the following July first and ending on June 30 of the next calendar year. The taxpayer in that case kept its books of account on the basis of a fiscal [78] year ending April 30, and used an accrual method of accounting. The question presented to the Board was the proper year in which to deduct these taxes. The taxpayer contended that it should be permitted to deduct in its fiscal year ended April 30, 1937, ten-twelfths of the California taxes which became a lien on the first Monday in March, 1936, and were for the State fiscal year July 1, 1936, to June 30, 1937 (because ten-twelfths of that State fiscal period fell within said fiscal year of the taxpayer). In other words, the taxpayer's theory was, as is apparently the theory of the decision herein, that taxes must be deducted in the taxpayer's accounting period in which falls the period for which the taxes are imposed. The Commissioner, however, there contended that taxes were required to be deducted in the year in which they accrued, and that they accrued in the taxpayer's fiscal year in which fell the lien date prescribed by the local law. Thus, in the cited case, his contention was that the taxpayer was required to deduct in its fiscal year ended April 30, 1937, the California taxes which became

a lien on the first Monday in March, 1937, notwithstanding they were for the period July 1, 1937, to June 30, 1938. The Board upheld the Commissioner. Clearly, this is directly opposed to the decision in the case at bar.

Any language in tax deduction cases which might appear to apply the principles applicable to "expense" deductions will be found to relate to taxes for which no statutory accrual or lien date is prescribed. There is no authority, however, for the proposition that taxes which, under unequivocal provisions of the local tax law, accrue and become a lien in one taxable year of the taxpayer, may be shifted by the Commissioner to another taxable year merely because that is the year for which the tax is imposed. Certainly, no case cited in the Opinion so holds; and the Trial Judge apparently recognized this for, as noted, his whole discussion is based upon the false premise that the accrual and lien provisions of the California Franchise Tax Act have "no significance" except for purposes of establishing the State's priority.

It is interesting to note that it is only in connection with the discussion of the deduction for the franchise tax as a business expense, that any reference is made in the Opinion to a proper accrual date as being affected by the requirement that the accrual "properly reflect" petitioner's net income. It is merely declared (Opinion, page 9), without consideration of any authorities, that the tax was "* * * an expense which must necessarily be taken into account in the tax year 1944 in order

properly to reflect petitioner's net income in that year." Again, it is clear that the Court is completely disregarding the [80] provisions of the local tax statute specifying the date of accrual of, and of the lien for, the tax. Petitioner fully discussed in its opening brief (pages 65 and following) the matter of the application of Section 41 and 43 of the Internal Revenue Code relating to the necessity for reporting income and deductions in a manner which clearly reflects income. The case of *Security Flour Mills v. Commissioner* (1944), 341 U. S. 281, 31 AFTR 1214, 1216, should lay at rest any possible contention that these sections were intended to authorize the Commissioner to take deductions out of the year in which they in fact legally accrued and put them in some other year, upon the ground that this is necessary in order "to clearly reflect income." However, the Opinion herein does not even refer to the *Security Flour Mills* case. On this point, too, the decision in the *Crown-Zellerbach* case, *supra*, is of interest. In holding that the taxes there involved accrued when they became a lien, and in rejecting the contention of the taxpayer that these taxes should be accrued only in the proportion that they were for a tax period included in the taxpayer's fiscal year, the Board necessarily held that the method of accounting approved by it clearly reflected income. In the present case, under the unequivocal provisions of the State law, the tax accrued and became a lien on December 31, 1943, and under the principle established in the *Security Flour Mills* case, [81]

the Commissioner is not, under such facts, entitled to shift the accrual date to some undesignated time in 1944, under the guise of properly reflecting petitioner's net income.

In conclusion, it is respectfully urged that the report promulgated herein on July 30, 1947, is based upon clear errors of law which, if uncorrected by this Court, will leave the decision unsupportable. Furthermore, the matter is of such general interest to corporations doing business in California, that this Court should not permit said report to become the decision of the Court without a review by the entire Court. Attention is called to the fact that the petitioner's briefs herein are printed briefs, so that a review by the entire Court may be expeditiously had. It is respectfully submitted that the Presiding Judge should exercise his discretion to direct the report to be reviewed by the Court.

Dated at Los Angeles, California, August 15, 1947.

THOMAS R. DEMPSEY,
ELMO H. CONLEY,
JOSEPH D. BRADY,
JOHN O. PAULSTON,

By /s/ JOHN O. PAULSTON

Counsel for the Petitioner.

Received and filed Aug. 19, 1947.

Served Aug. 20, 1947.

Denied Aug. 21, 1947. Bolon B. Turner, Presiding Judge. [82]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit:

Now comes Central Investment Corporation, a
corporation, by Joseph D. Brady and John O. Paul-
ston, its attorneys, and respectfully shows:

I.

Jurisdiction and Venue

The petitioner on review (hereinafter sometimes referred to as the petitioner) is a California corporation. The respondent on review is the duly appointed, qualified, and acting Commissioner of Internal Revenue. The case involves the federal excess profits tax liability of petitioner [83] for the calendar year 1943. Respondent determined that there was a deficiency in petitioner's excess profits tax liability for said year in the amount of \$34,971.23. The Tax Court of the United States, on July 30, 1947, promulgated its Findings of Fact and Opinion (per Judge Hill) upholding this determination by respondent, and on July 31, 1947, pursuant to said findings and opinion, entered its decision that there was a deficiency in excess profits tax due from petitioner for the year 1943 in the sum of \$34,971.23. Thereafter, and prior to August 21, 1947, petitioner filed with the Tax Court a motion for a review by the full Court, but this

motion was denied by the Presiding Judge of the Tax Court on August 21, 1947. This petition for review is for a review of said decision by the Tax Court upholding respondent's determination of a deficiency, and is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. The Court in which said review is sought is the United States Circuit Court of Appeals for the Ninth Circuit. Venue in said Ninth Circuit is established by the fact that petitioner's excess profits tax return for the taxable year 1943 was filed with the Collector of Internal Revenue for the Sixth District of California, located at Los Angeles, which collection district is within the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit, and by the fact that the parties hereto have not stipulated that said decision by the Tax Court may be reviewed by any Court [84] of Appeals other than the one herein designated.

II.

Nature of Controversy

Petitioner is, and at all material times has been, the owner of the Biltmore Hotel in Los Angeles, California. It has kept its books and filed its tax returns on the accrual method and for the accounting period of the calendar year. On December 31, 1943, it accrued its liability for the California franchise tax, under the California Bank and Corporation Franchise Tax Act, in the amount of \$43,174.26, based upon its net income for the year 1943, and

in its federal income and excess profits tax returns for 1943 it claimed the deduction for said accrued liability. The amount so accrued was in fact paid by petitioner in 1944 at the times required by the California Bank and Corporation Franchise Tax Act. It is not disputed that the amount so accrued was the correct amount of petitioner's franchise tax liability based upon its 1943 net income. The respondent determined, however, that this liability had not accrued in 1943, but would accrue only in 1944, and was therefore not deductible in determining the net income of 1943 for federal income or excess profits tax purposes. This determination by respondent was made notwithstanding that the California Bank and Corporation Franchise Tax Act expressly provides, and did provide on and prior to December 31, 1943, that taxes imposed by said Act accrued on the last day of [85] the year the income of which was the basis for the tax, and that said taxes should constitute a lien upon the real property of the taxpayer, which lien should attach on said last day of the year the income of which was the basis for said tax. The Tax Court upheld this determination of the respondent, upon the ground that these provisions of the Act had significance only in terms of priority of liens and did not affect the question of accrual for federal tax purposes.

The Tax Court of the United States erred:

1. In holding and deciding that the amount of \$43,174.36, which was the amount of the

California franchise tax based upon petitioner's net income for the calendar year 1943, did not accrue on December 31, 1943.

2. In holding and deciding that said amount of \$43,174.36 was not deductible by petitioner in computing its net income for federal income and excess profits tax purposes for the calendar year 1943.

3. In holding and deciding that said amount of \$43,174.36 was deductible by petitioner in computing its net income for federal income and excess profits tax purposes for the calendar year 1944 only.

4. In holding and deciding that there was any deficiency in any sum whatsoever in the payment of petitioner's excess profits tax for the year 1943. [86]

5. In rendering an opinion and decision which, in the respects above enumerated, are contrary to the controlling law and the regulations, and are not supported by any evidence in the case.

Wherefore, petitioner prays that the decision of The Tax Court of the United States be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of said Court for filing; and that appropriate action be taken to

the end that the errors herein complained of may be reviewed and corrected by said Court.

Dated October 23, 1947.

/s/ JOSEPH D. BRADY,

/s/ JOHN O. PAULSTON,

Counsel for Petitioner
on Review.

Filed Oct. 30, 1947. [87]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To the Honorable George J. Schoeneman, Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., and the Honorable Charles Oliphant, Chief Counsel for the Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.:

You Are Hereby Notified that on the 30th day of October, 1947, the above petitioner filed with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of [88] Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the

above-entitled cause. A copy of the petition for review as filed is attached hereto, and served upon you.

Dated this 30th day of October, 1947.

/s/ JOSEPH D. BRADY,
/s/ JOHN O. PAULSTON,
Counsel for Petitioner
on Review.

Service of the foregoing notice, together with a copy of the petition for review, is acknowledged this 30th day of October, 1947.

GEORGE J. SCHOENEMAN,
Commissioner of
Internal Revenue,
Respondent,

CHARLES OLIPHANT,
Chief Counsel for the Bureau
of Internal Revenue,

By /s/ CHARLES OLIPHANT, CAR

Filed Oct. 30, 1947. [89]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 7959

CENTRAL INVESTMENT CORPORATION
(a corporation),

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

ORDER DIRECTING TRANSMISSION OF
ORIGINAL REPORTER'S TRANSCRIPT
AND ORIGINAL EXHIBITS ON FILE
WITH THE TAX COURT

The above-designated petitioner on review having duly filed its petition for a review of the decision of the Tax Court on the United States in a proceeding before said Tax Court bearing docket number 7959, in which proceeding the Tax Court rendered its decision on July 31, 1947, that there is a deficiency in federal excess profits tax owing by the petitioner for the calendar year 1943 in the amount of \$34,971.23, and said petitioner having duly filed its Designation of the Contents of the Record on Review and having presented to this Court its Motion for Transmission of Original Reporter's Transcript and Original Exhibits on File with the Tax Court in lieu of transcribing said Reporter's Transcript and copying said exhibits into [90] the record on review:

It Is Hereby Ordered that the Clerk of the Tax

Court of the United States be, and he is hereby, directed to furnish the United States Circuit Court of Appeals for the Ninth Circuit with the original exhibits on file with the Clerk of the Tax Court in said action bearing docket number 7959 in the files of said Court, said original records to be in lieu of copying the same into the transcript prepared by the Clerk of the Tax Court of the record on review herein.

Dated, October 28, 1947.

WILLIAM DENMAN,
Acting Senior United States
Circuit Judge.

[Endorsed]: Filed Oct. 28, 1947. [91]

In The Tax Court of the United States
Docket No. 7959

CENTRAL INVESTMENT CORPORATION
(a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United
States:

The above-designated petitioner, being also the

petitioner on review, hereby designates for inclusion in the record for consideration by the United States Circuit Court of Appeals for the Ninth Circuit on review of the decision of the Tax Court of the United States entered in said action on July 31, 1947, the following:

1. The docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court, including:

(a) Petition, including annexed Exhibit A (being a copy of deficiency letter and statement attached thereto).

(b) Answer. [92]

3. The complete record of all the proceedings and evidence taken before the Tax Court of the United States, together with copies of exhibits introduced in evidence, except that if the United States Circuit Court of Appeals for the Ninth Circuit orders and directs the transmission of the original Reporter's Transcript of the proceedings and evidence before the Tax Court to said Circuit Court of Appeals, the transmission of said original Reporter's Transcript may be deemed to be made in lieu of transcribing a copy thereof into the record prepared pursuant to this designation, and except that if the Circuit Court of Appeals for the Ninth

Circuit orders and directs the transmission of the original exhibits on file with the Clerk of the Tax Court to said Circuit Court of Appeals in their original form for the inspection of that Court, the transmission of such original exhibits may be deemed to be made in lieu of copying the same into the record prepared pursuant to this designation.

4. The Findings of Fact and Opinion of the Tax Court, promulgated July 30, 1947.

5. The Decision of the Tax Court, entered July 31, 1947.

6. Motion for Review by the Court of Report of a Division (Judge Hill).

7. Order dated August 21, 1947, denying motion for review by full Court. [93]

8. Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit.

9. Notice of Filing Petition for Review, together with proof of service thereof and of service of a copy of the Petition for Review.

10. This Designation of Contents of Record on Review.

Request is hereby made that a transcript of said record be prepared, certified, and transmitted by the Clerk of the Tax Court of the United States to the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit as required by law and the rules of said Circuit Court of Appeals.

Dated October 23, 1947.

/s/ JOSEPH D. BRADY,

/s/ JOHN O. PAULSTON,

Counsel for Petitioner.

Personal service of a copy of the foregoing Designation is hereby acknowledged as having been made this 30th day of October, 1947.

GEORGE J. SCHOENEMAN,

Commissioner of

Internal Revenue,

Respondent,

CHARLES OLIPHANT,

Chief Counsel for the Bureau
of Internal Revenue,

By /s/ CHARLES OLIPHANT, CAR.

Filed Oct. 30, 1947. [94]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 94, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of November, 1947.

[Seal] /s/ VICTOR S. MERSCH, EMT
Clerk, The Tax Court of
the United States.

[Endorsed]: No. 11796. United States Circuit Court of Appeals for the Ninth Circuit. Central Investment Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed November 21, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11796

CENTRAL INVESTMENT CORPORATION
(a corporation),

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

DESIGNATION OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY AND
OF PORTIONS OF RECORD NECESSARY
FOR CONSIDERATION THEREOF

The certified typewritten transcript of record in the above-entitled cause having been duly filed with the Clerk of the above-entitled Court, and there also having been filed with said Clerk, pursuant to order of this Court duly made, the exhibits in their original form as filed in the proceeding in the Tax Court from which this review has been taken, the petitioner on review hereby designates the points upon which it intends to rely upon this review, and the portions of the record which are necessary for the consideration of said points and which shall be included in the printed record.

(a) The points upon which petitioner on review intends to rely upon this review are as follows:

1. The Tax Court of the United States erred in holding and deciding that the amount of \$43,174.36, which was the amount of the California franchise tax based upon petitioner's net income for the calendar year 1943, did not accrue on December 31, 1943.

2. The Tax Court of the United States erred in holding and deciding that said amount of \$43,174.36 was not deductible by petitioner in computing its net income for federal income and excess profits tax purposes for the calendar year 1943.

3. The Tax Court of the United States erred in holding and deciding that said amount of \$43,174.36 was deductible by petitioner in computing its net income for federal income and excess profits tax purposes for the calendar year 1944 only.

4. The Tax Court of the United States erred in holding and deciding that there was any deficiency in any sum whatsoever in the payment of petitioner's excess profits tax for the year 1943.

5. The Tax Court of the United States erred in rendering an opinion and decision which, in the respects above enumerated, are contrary to the controlling law and the regulations, and are not supported by any evidence in the case.

(b) The portions of the record necessary for the consideration of said points and required to be included in the printed record, are as follows:

The entire typewritten transcript of record filed in said cause, together with the original exhibits heretofore transmitted to this Court in their original form, except only Exhibits A and B; provided, however, that if this Court orders and directs that said exhibits, other than Exhibits A and B, shall be omitted from the printed record but that said omitted exhibits shall be considered by the Court in their original form as though set out in the printed record, then, and only then, said entire typewritten transcript of record, only (not including any of the exhibits), is necessary for the consideration of this review and shall be included in the printed record.

Dated, November 26, 1947.

/s/ JOSEPH D. BRADY,
/s/ JOHN O. PAULSTON,
Counsel for Petitioner
on Review.

[Endorsed]: Filed Nov. 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

ORDER FOR CONSIDERATION OF
ORIGINAL EXHIBITS

The above-designated petitioner on review having duly filed its motion for consideration, in their original form, of the exhibits heretofore transmitted to this Court by the Clerk of the Tax Court, and good cause therefor appearing:

It Is Hereby Ordered that Exhibits A, B, C, D, E, F, and G, introduced in evidence before the Tax Court of the United States in the proceeding from which the present review has been taken, and heretofore transmitted to this Court in their original form and now in the files of the above-entitled proceeding on review in this Court, shall be omitted from the printed record on review herein, and that said omitted exhibits shall be considered by this Court in connection with this review in their original form as though set out in said printed record on review.

Dated, November 28, 1947.

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

[Endorsed]: Filed Nov. 28, 1947.

No. 11796.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL INVESTMENT CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

PETITIONER'S OPENING BRIEF.

JOSEPH D. BRADY,

JOHN O. PAULSTON,

c/o Brady & Nossaman, 433 South Spring Street,
Los Angeles 13, California,

Counsel for Petitioner.

FILED
FEB 1938

TOPICAL INDEX

| | PAGE |
|--|------|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes and regulations involved..... | 3 |
| Statement of the case..... | 3 |
| Specification of errors relied upon..... | 8 |
| Summary of petitioner's argument..... | 9 |
| Argument | 10 |

I.

| | |
|--|----|
| The reviewing powers of this court in the present case are not restricted by the principle of the Dobson case..... | 10 |
|--|----|

II.

| | |
|---|----|
| Petitioner properly accrued on its books of account as of December 31, 1943, its liability for the California Franchise Tax based upon its 1943 net income..... | 12 |
|---|----|

III.

| | |
|---|----|
| Petitioner was entitled to a deduction, in its Federal Tax return for 1943, for the California Franchise Tax which it accrued on its books on December 31, 1943, on the basis of its 1943 net income..... | 20 |
| A. Local law is controlling as to when a local tax "accrues" for purposes of a deduction under the Internal Revenue Code | 20 |
| B. Where there is a specific accrual and lien date in the local law, that date controls as the accrual date for Federal tax purposes..... | 24 |

ii.

PAGE

| | | |
|------------|--|----|
| C. | A disregard of the statutory accrual and lien date is not required by reason of any "contingencies" as to liability for, or amount of, the franchise tax on the last day of the income year..... | 31 |
| (1) | Extent of the right, under the California Franchise Tax Act, to a refund in the event of dissolution during the "taxable year"..... | 32 |
| (2) | Extent of Tax Court power to disallow a tax deduction as being only a contingent liability..... | 33 |
| D. | A disregard of the statutory accrual and lien date is not required by reason of the fact that the tax is for a subsequent period | 45 |
| E. | A disregard of the statutory accrual and lien date is not required by the principle that deductions must "properly reflect" petitioner's net income..... | 54 |
| Conclusion | | 56 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|--------------------|
| Atlantic Coast Line R. Co., 4 T. C. 140..... | 41, 42 |
| Baltimore Transfer Co., 8 T. C. 1..... | 34, 37 |
| Bernheimer, S. E., 41 B. T. A. 249, aff'd 121 F. (2d) 454..... | 30, 53 |
| Brown, H. H., Co., 8 B. T. A. 112..... | 46, 48, 49, 50 |
| Budd International Corp., 45 B. T. A. 737..... | 41 |
| Budd International Corp. v. Commissioner, 143 F. (2d) 784..... | 41 |
| California Sanitary Co., Ltd., 32 B. T. A. 122..... | 26, 27, 47 |
| Cartex Mills, Inc., 42 B. T. A. 894 (N. A., 1942-2 C. B., p. 22; G. C. M. 22404, C. B. 1940-2, p. 204)..... | 38 |
| Commissioner v. LeRoy, 152 F. (2d) 936..... | 21 |
| Commissioner v. North Shore Bus Co., 143 F. (2d) 114..... | 37 |
| County of San Diego v. County of Riverside, 125 Cal. 495, 58 Pac. 81 | 15, 18 |
| Crown Zellerbach Corp., 43 B. T. A. 541; dismissed 30 A. F. T. R. 1630..... | 26, 27, 28, 47, 55 |
| Dixie Pine Products Co. v. Commissioner, 320 U. S. 516, 64 S. Ct. 364, 88 L. Ed. 270..... | 38 |
| Dobson v. Commissioner, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248 | 11, 12 |
| Durst Productions Corporation, 8 T. C. 1326..... | 46, 50, 51, 52, 53 |
| East Bay Municipal Utility District v. Garrison, 191 Cal. 680 | 18, 19, 30 |
| Fawsett, Charles F., 30 B. T. A. 908..... | 38 |
| Helvering v. Russian Finance & Construction Corp., 77 F. (2d) 324 | 34 |
| Knox-Powell-Stockton Co., In re, 100 F. (2d) 979..... | 15, 16, 17 |
| Louisiana Delta Hardwood Lbr. Co., Inc., 7 T. C. 994..... | 41 |
| Magruder v. Supplee, 316 U. S. 394, 62 S. Ct. 1162, 86 L. Ed. 1555 | 21, 26, 27 |
| Manhattan Soap Co. (T. C. Memo. 3-22-44), P.-H. T. C. Memo. Dec., par. 44,092, C. C. H. Dec. 13,825(M) (3 T. C. M. 257) | 37 |

| | PAGE |
|---|------------------------|
| North Shore Bus Co. (T. C. Memo. 1-27-43), P.-H. T. C. Memo. Dec., par. 43,041, C. C. H. Dec. 12,944-B (1 T. C. M. 493) | 36 |
| Petaluma & Santa Rosa R. R. Co., 11 B. T. A. 541..... | 46, 47, 48 |
| Security Flour Mills Co. v. Commissioner, 321 U. S. 281, 64 S. Ct. 596, 88 L. Ed. 725..... | 11, 12, 31, 55 |
| United States v. Anderson, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347..... | 29, 46, 47, 50, 51, 53 |
| United States v. Sampsell, 153 F. (2d) 731..... | 13, 14, 15, 17, 19 |
| W. J. Bush & Co., Inc. (T. C. Memo., 1-8-45), P.-H. T. C. Memo. Dec., par. 45,054, C. C. H. Dec. 14,390(M) (4 T. C. M. 194) | 39 |

STATUTES

California Bank and Corporation Franchise Tax Act (California Statutes 1929, page 19, as amended to and in effect on December 31, 1943):

| | |
|------------------|----------|
| Sec. 2(7) | 13 |
| Sec. 4(3) | 3, 4, 32 |
| Sec. 4(5) | 3, 4, 32 |
| Sec. 4(7) | 3, 4, 5 |
| Sec. 5 | 3 |
| Sec. 7.5 | 4 |
| Sec. 11 | 3, 4 |
| Sec. 11(a) | 4 |
| Sec. 11(b) | 4 |
| Sec. 13 | 3 |
| Sec. 13(a) | 6 |
| Sec. 13(h) | 4 |
| Sec. 13(k) | 4, 32 |
| Sec. 13(l) | 4 |
| Sec. 22 | 3 |
| Sec. 23 | 3, 6 |
| Sec. 29 | 3, 4, 13 |
| Sec. 29(a) | 5 |

| | PAGE |
|---|-----------|
| California Franchise Tax Regulation, Art. 29-1, par. 2..... | 32 |
| California Statutes of 1935, p. 960..... | 4 |
| California Statutes of 1935, p. 979..... | 4 |
| California Statutes of 1939, pp. 960, 979..... | 13 |
| California Statutes of 1943, p. 1403, Chap. 352 | 5 |
| California Statutes of 1943, pp. 1404, 1458, Chap. 352..... | 5 |
| Internal Revenue Code, Sec. 23(c)..... | 3, 9, 21 |
| Internal Revenue Code, Sec. 23(c) (1)..... | 2, 20, 25 |
| Internal Revenue Code, Sec. 41..... | 3 |
| Internal Revenue Code, Sec. 43..... | 3 |
| Internal Revenue Code, Sec. 48(c)..... | 3 |
| Internal Revenue Code, Sec. 322(d) | 7, 56 |
| Internal Revenue Code, Secs. 600-605 | 40 |
| Internal Revenue Code, Sec. 1012(a)..... | 1 |
| Internal Revenue Code, Sec. 1141..... | 1 |
| Internal Revenue Code, Sec. 1141(c) (1)..... | 8 |
| Internal Revenue Code, Sec. 1142..... | 1 |
| Internal Revenue Code, Sec. 1145..... | 8 |
| Internal Revenue Code, Sec. 1200..... | 39 |
| Internal Revenue Code, Sec. 1200(a)..... | 40 |
| Internal Revenue Code, Sec. 1202(a)..... | 40 |
| Internal Revenue Code, Sec. 1203(b)..... | 40 |
| Regulations 111: | |
| Sec. 29.23(c)-1 | 3 |
| Sec. 29.41-1 | 3 |
| Sec. 29.41-2 | 3 |
| Sec. 29.41-3 | 3 |
| Sec. 29.43-1 | 3 |
| Sec. 29.43-2 | 3 |
| Revenue Act of 1945, Sec. 205..... | 39 |

| TEXTBOOKS AND RULINGS | PAGE |
|---|------|
| California Corporation Tax Service, Par. 5-951.02 | 5 |
| California Corporation Tax Service, par. 8-053..... | 32 |
| Cumulative Bulletin 1938-1, p. 124, I. T. 3149..... | 39 |
| Cumulative Bulletin, 1940-2, p. 204, G. C. M. 22404..... | 38 |
| Cumulative Bulletin, 1944, p. 104, I. T. 3646..... | 23 |
| G. C. M. 22404, C. B. 1940-2, p. 204..... | 38 |
| I. T. 3149, C. B. 1938-1, p. 124..... | 39 |
| I. T. 3646, C. B. 1944, p. 104..... | 23 |
| Mayer, The Accrual Date of the New York State Franchise Tax, Taxes, Vol. 26, No. 1, p. 43..... | 51 |
| Paul, Selected Studies in Federal Taxation, Second Series, p. 23 | 21 |

INDEX TO APPENDIX

| | PAGE |
|---|------|
| Statutes, Regulations and Rulings Involved..... | 1 |
| California Bank and Corporation Franchise Tax Act (Calif. Stats. 1929, p. 19) as amended to and in effect on December 31, 1943: | |
| Section 4(3) | 4 |
| Section 4(5) | 4 |
| Section 4(7) | 5 |
| Section 5 | 5 |
| Section 11 | 5 |
| Section 13 | 6 |
| Section 22 | 13 |
| Section 23 | 14 |
| Section 29 | 14 |
| California Corporation Tax Service: | |
| Paragraph 5-312a, Art. FT 13(k)-No. 1..... | 17 |
| Paragraph 5-313, Art. 13(m)-1..... | 16 |
| Paragraph 5-911.04 | 17 |
| Paragraph 5-951.02 | 16 |
| Paragraph 8-053, Art. 29-1..... | 18 |
| Internal Revenue Code: | |
| Section 23(c)(1) | 1 |
| Section 41 | 1 |
| Section 43 | 1 |
| Section 48(c) | 2 |

Regulations 111:

| | |
|--------------------------|---|
| Section 29.23(c)-1 | 2 |
| Section 29.41-1 | 2 |
| Section 29.41-2 | 2 |
| Section 29.41-3 | 3 |
| Section 29.43-1 | 3 |
| Section 29.43-2 | 3 |

Rulings:

| | |
|---|----|
| California Franchise Tax Commissioner's Letter Ruling, Cal. C. T. par. 5-951.02..... | 16 |
| Art. 13(m)-1, Cal. C. T. par. 5-313..... | 16 |
| Art. FT 13(k)-No. 1, Cal. C. T. par. 5-911.04..... | 17 |
| Art. 29-1, Cal. C. T. par. 8-053..... | 18 |
| Opinion of California Attorney General No. NS 4439, Cal. C. T. par. 5-312a..... | 17 |

No. 11796.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL INVESTMENT CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

PETITIONER'S OPENING BRIEF.

Opinion Below.

The opinion of the Tax Court [R. 52-59] is reported in 9 T. C. 128.

Jurisdiction.

The petition herein is to review the decision of the Tax Court of the United States involving taxpayer's excess profits tax liability for the calendar year 1943.

The jurisdiction of the Tax Court is based upon Section 1012(a) of the Internal Revenue Code. The jurisdiction of this Court is based on Sections 1141 and 1142 of the Internal Revenue Code.

The pleadings and facts supporting such jurisdiction are as follows:

Petitioner's Federal excess profits tax return for the calendar year 1943 was filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles. [R. 47.] Respondent determined a deficiency in petitioner's excess profits tax liability in the amount of \$34,971.23, and notified petitioner of this determination under date of March 21, 1945. [R. 8-13.] Petition for redetermination [R. 3-13] was filed with the Tax Court on May 8, 1945. [R. 2.]

The Tax Court (per Hill, Judge) promulgated its Findings of Fact and Opinion on July 30, 1947. [R. 46-59.] The Decision of the Tax Court, pursuant to said Findings of Fact and Opinion, that there is a deficiency in excess profits tax for the calendar year 1943 in the amount of \$34,971.23, was entered on July 31, 1947. [R. 60.] Petitioner's motion for a review by the entire Tax Court, filed August 19, 1947, was denied by the Presiding Judge on August 21, 1947. [R. 74.] Taxpayer's petition for review was filed on October 30, 1947. [R. 75-79.]

Question Presented.

Is petitioner, which keeps its books on the accrual basis, entitled, under Section 23(c)(1), Internal Revenue Code, to a deduction for its taxable year ended December 31, 1943, in the amount of \$43,174.36, for a California franchise tax which, under the law of California, accrued and became a lien on December 31, 1943?

Statutes and Regulations Involved.

The statutes and regulations involved are as follows:

Internal Revenue Code, Sections 23(c), 41, 43, and 48(c);

Regulations 111, Sections 29.23(c)-1, 29.41-1, 29.41-2, 29.41-3, 29.43-1, and 29.43-2;

California Bank and Corporation Franchise Tax Act (California Statutes 1929, page 19, as amended to and in effect on December 31, 1943), Sections 4(3), 4(5), 4(7), 5, 11, 13, 22, 23 (part) and 29.

These statutory provisions and regulations, together with the applicable portions of regulations and rulings by the California Franchise Tax Commissioner (there being no official publication of the latter regulations and rulings), are set forth in the Appendix hereto.

Statement of the Case.

Petitioner is a California corporation organized October 6, 1921, with its principal office and place of business at Los Angeles, California. [R. 3, 14, 47.] It is the owner of the real property known as the Biltmore Hotel in that city. [R. 4-5, 14, 47.] At all times material hereto it was subject to the provisions of the California Bank and Corporation Franchise Tax Act (California Statutes 1929, page 19, Chapter 13, as amended; hereinafter referred to as the Franchise Tax Act or the Act), which was enacted in 1929. [R. 4-5, 14, 47.]

This Act imposes¹ an annual tax on corporations, for the privilege of exercising their corporate franchises with-

¹References herein to the Act in the present tense include also the taxable year in question, viz., 1943, unless the context indicates otherwise.

in this state, according to or measured by net income, at the rate of 4 per centum upon the taxpayer's net income for its next preceding fiscal or calendar year.² Since 1935, the year the net income of which forms the basis for the tax has been known as the "income year," and the year for and in which the tax is payable has been known as the "taxable year."³ (Act, Sec. 11(a) and (b).)

This tax is in lieu of all *ad valorem* taxes and assessments of every kind and nature upon the general corporate franchises of the corporations so taxed. (Act, sec. 4(7).) If the corporation completely ceases business activities in any corporate form during the year in and for which the tax is paid, the amount of the tax is reduced proportionately, *but in no event may it be below the minimum amount specified in the statute.* (Act, secs. 13(k), 13(h), 4(3), 4(5). See also sec. 13(1).)

For some time prior to 1943 the Act had expressly provided that the taxes thereby imposed "shall accrue on the first day of the 'taxable year' * * *" (Act, sec. 4(7), as amended by Cal. Stats. 1935, p. 960), and should constitute a lien upon the real property of the taxpayer, which lien "shall attach on the first day of the 'taxable year' * * *."⁴ (Act, sec. 29, as amended by Cal. Stats. 1935, p. 979.) The Act expressly provided that this lien "shall have the same force, effect and priority as a judg-

²A special credit of 15% was allowed by Section 7.5 of the Act, with respect to taxable years beginning after December 31, 1943.

³In referring to earlier authorities, it should be borne in mind that prior to 1935 the year the income of which formed the basis for the tax was known as the "taxable year." (See Cal. Stats. 1929, p. 25, sec. 11.)

⁴In the case of commencing corporations the lien of taxes for the first taxable year attaches at the time of incorporation or qualification to do business in this State.

ment lien” and “shall remain until the taxes are paid or the property subject to the lien is sold for the payment thereof, or until the lien is released or otherwise extinguished.” (*Ibid.*)

In 1943 the California Legislature changed the date when the lien attached (for other than commencing corporations) to the *last* day of the “*income* year,” and changed the statutory “accrual” date to conform to the “lien” date as so modified (Act, sec. 4(7), and 29(a), respectively, as amended by Cal. Stats. 1943, Ch. 352, at pages 1404 and 1458). The act adopting these amendments was approved by the Governor and filed with the Secretary of State on May 7, 1943, and became effective immediately (Cal. Stats. 1943, Ch. 352, p. 1403), and the California Franchise Tax Commissioner ruled that they were applicable with respect to any income year ending after such effective date. [Informal letter ruling of Franchise Tax Commissioner, Cal. C. T., par. 5-951.02, Appendix hereto, p. 16.]

At all times material hereto petitioner’s annual accounting period has been the calendar year and petitioner has kept its books of account and made and filed its Federal income and excess profits tax returns on the accrual basis, which basis admittedly clearly reflects its income. [R. 5, 14; *cf.* R. 47.] Petitioner did not, on December 31, 1943, or at any other time material hereto, have pending any negotiations for the possible sale of its Biltmore Hotel property, nor did it contemplate dissolution or liquidation. [R. 5, 14, 47.] Accordingly, before closing its books of account for the calendar year 1943, it set up therein a liability of \$43,174.36, as of December 31, 1943, for the tax which it correctly computed under the Franchise Tax Act on the basis of its net income for 1943. It did not

then or at any other time dispute its liability for the full amount of said tax. [R. 6, 14, 51.]

The taxpayer is required by the Act, to file its tax return within two months and fifteen days after the close of its "income year." (Act, sec. 13(a).) One-half of the tax is due and payable with the return, and the balance on or before the fifteenth day of the ninth month following the close of the "income year." (Act, sec. 23.) Accordingly, in 1944 petitioner duly filed its California franchise tax return showing said franchise tax liability based on its 1943 net income, and duly paid the full amount thereof. Petitioner has never filed any claim for refund or credit for the whole or any part thereof, and has never had, and does not now have, any intention of filing any such claim. [R. 5, 6, 14, 50-51.]

In petitioner's Federal income and excess profits tax returns for the calendar year 1943 a deduction was claimed and taken for said franchise tax in the amount of \$43,174.36. [R. 6, 14.] Also, as the Tax Court found from evidence adduced by respondent at the trial, petitioner claimed a deduction in its Federal excess profits tax return for the calendar year 1943 for the California franchise tax in the amount of \$19,736.60 imposed on the basis of its net income in 1942 and duly paid by petitioner in 1943. [R. 51.] As hereinbefore stated, the Franchise Tax Act expressly provided, prior to the 1943 amendments, that the franchise tax accrued and became a lien on the first day of the "taxable year." January 1, 1943, was the first day of petitioner's "taxable year" with respect to which said tax of \$19,736.60 was imposed.

In determining the deficiency respondent disallowed in its entirety the deduction of \$43,174.36 claimed for the franchise tax based upon petitioner's 1943 net income.

[R. 6, 14, 47.] In his Statement accompanying the deficiency notice with respect to 1943, respondent stated [R. 12]:

EXPLANATION OF ADJUSTMENT

California State franchise tax paid during the year 1944, amounting to \$43,174.36, treated as a deduction on your return for the calendar year 1943 is disallowed, since it is held that such taxes are properly allowable and deductible during the calendar year 1944 under section 23(c) of the Internal Revenue Code.

The Tax Court sustained respondent's determination. [R. 46-60.]

It should be further noted that after the petition was filed with the Tax Court, and on or about May 17, 1945, petitioner, without admitting that any part of the alleged deficiency for 1943 was properly owing, but in order to prevent further accrual of interest thereon, consented, on Treasury Department Form 874, to the assessment and collection of a deficiency in excess profits in said amount of \$34,971.23, together with interest thereon as provided by law. Pursuant to this consent, the Bureau of Internal Revenue prepared its assessment and issued its notice and demand thereon. Accordingly, on July 31, 1945, petitioner paid in full the amount of said assessment and interest thereon. If the Tax Court had rendered its decision in favor of petitioner, and found that there was no deficiency in excess profits tax for 1943, it would have been required to determine the amount of overpayment by reason of the aforesaid payment by petitioner after the filing of the petition with the Tax Court. (Sec. 322(d), I. R. C.) The full amount of the asserted deficiency having thus been paid before the decision by the Tax Court, no bond

was filed to stay the assessment and collection thereof. (See sec. 1145, I. R. C.) Therefore, upon a decision by this court that the Tax Court erred in its decision herein, it is submitted that the appropriate disposition of the case would be to reverse the decision of the Tax Court and remand the case for a hearing and finding by that court upon the sole question of the overpayment of the tax here in question (see sec. 1141(c)(1), I. R. C.), and for entry of decision accordingly.

Specification of Errors Relied Upon.

The points upon which petitioner on review intends to rely upon this review are as follows:

1. The Tax Court of the United States erred in holding and deciding that the amount of \$43,174.36, which was the amount of the California franchise tax based upon petitioner's net income for the calendar year 1943, did not accrue on December 31, 1943.

2. The Tax Court of the United States erred in holding and deciding that said amount of \$43,174.36 was not deductible by petitioner in computing its net income for federal income and excess profits tax purposes for the calendar year 1943.

3. The Tax Court of the United States erred in holding and deciding that said amount of \$43,174.36 was deductible by petitioner in computing its net income for federal income and excess profits tax purposes for the calendar year 1944 only.

4. The Tax Court of the United States erred in holding and deciding that there was any deficiency in any sum whatsoever in the payment of petitioner's excess profits tax for the year 1943.

5. The Tax Court of the United States erred in rendering an opinion and decision which, in the respects above enumerated, are contrary to the controlling law and the regulations, and are not supported by any evidence in the case.

Summary of Petitioner's Argument.

A clear question of law is presented.

Section 23(c) of the Internal Revenue Code provides for a deduction of taxes "paid or accrued within the taxable year * * *." Whether state taxes have "accrued within the taxable year" must be determined by the provisions of the state taxing statute.

Under the express provisions of the California Bank and Corporation Franchise Tax Act, liability for the franchise tax imposed thereby arose, and a lien therefor attached to the real property of the taxpayer, on the last day of the year the income of which formed the basis for the tax. Pursuant to these provisions, petitioner properly accrued on its books of account on December 31, 1943, its liability for the California franchise tax based upon its 1943 net income, and deducted the amount so accrued in its Federal excess profits tax return for its calendar year 1943.

The Tax Court erred in disregarding the controlling state law and in holding that petitioner was not entitled to the deduction claimed, in 1943, upon the alleged grounds that liability for the franchise tax did not arise until 1944, the year *for* which the tax was imposed, and that the tax was required to be deducted in 1944 in order "to properly reflect" petitioner's net income.

ARGUMENT.

I.

The Reviewing Powers of This Court in the Present Case Are Not Restricted by the Principle of the Dobson Case.

The Tax Court held that petitioner was not entitled to a deduction, in its excess profits tax return for the year 1943, of the amount of the California franchise tax based upon its 1943 net income. This holding was made notwithstanding the local taxing statute *expressly* provided that the taxes thereby imposed accrued and became a lien on the real property of the taxpayer on the last day of the taxpayer's "income year"—*i. e.*, the year on the income of which the tax is based—and notwithstanding petitioner had, in accordance with said provision, set up on its books of account as of December 31, 1943, its liability for said tax based on its net income for 1943.

In reaching this decision, the Tax Court was required to interpret certain provisions of the California Franchise Tax Act and of the Internal Revenue Code. As to the former, it held that "* * * the provisions of the [Franchise Tax] Act, specifying the last day of the 'income year' as the time of accrual and as the lien date, are for a special and limited purpose only, *i. e.*, priority of liens * * *." [9 T. C. 134, R 58-59.] As to the latter, it held, in effect, that the provisions of the Internal Revenue Code relating to deductions for taxes by a taxpayer on the accrual basis precluded a deduction for state franchise taxes in any year other than the privilege year *for* which the tax is paid, despite provisions of the local taxing statute expressly designating an earlier date as the accrual and lien date for the taxes thereby imposed.

Thus, the questions involved upon this review are (1) whether the Tax Court erred in its interpretation of the provisions of the California Franchise Tax Act specifying the date for the accrual of liability for the franchise tax and for the attaching of the lien in support thereof, and (2) whether the Tax Court erred in its interpretation of the provisions of the Internal Revenue Code relating to deductions for taxes by a taxpayer on the accrual basis. The question is *not* whether the Tax Court, within its discretion, made a determination of *fact* which, under the principle established in *Dobson v. Commissioner* (1943), 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248, may not be disturbed on appeal. Rather, as in *Security Flour Mills Co. v. Commissioner* (1944), 321 U. S. 281, 64 S. Ct. 596, 88 L. Ed. 725, it is whether, as a matter of *law*, the Tax Court misconstrued the extent of the power conferred by the Revenue Act to determine the year in which deductions are “accrued” for Federal income tax purposes. There the Board of Tax Appeals had held⁵ that the taxpayer was entitled, in reporting its income tax for the year 1935, to deduct tax payments made by it in 1936, 1937 and 1938. The Circuit Court of Appeals for the Tenth Circuit reversed⁶ upon the ground that the taxpayer could not accrue said taxes in 1935, because it was at that very time contesting its liability therefor and had not in fact paid the taxes. The Supreme Court, in affirming the decision of the Circuit Court of Appeals, disposed of the possible application

⁵45 B. T. A. 671.

⁶135 F. (2d) 165.

of the *Dobson* case in support of the decision by the Board of Tax Appeals by saying (321 U. S. 286, 64 S. Ct. 598, 88 L. Ed. 729):

The question is not whether the Board within its discretion, made a determination of fact. Compare *Dobson v. Helvering*, 320 U. S. 489, 64 S. Ct. 239. It is rather whether, as matter of law, the Board misconstrued the extent of the power conferred by the Revenue Act.

The same is clearly true in the present case.

II.

Petitioner Properly Accrued on Its Books of Account as of December 31, 1943, Its Liability for the California Franchise Tax Based Upon Its 1943 Net Income.

The pertinent provisions of the California Franchise Tax Act have been summarized in the Statement of the Case. As there pointed out, the Act as amended in 1943 expressly provides that the tax accrues and the lien in support thereof attaches to the real property of the taxpayer on the last day of the "income year," instead of on the first day of the "taxable year," as was the case for some time prior to 1943. The "income year" is the year on the income of which the franchise tax is based, and the "taxable year" is the year *for* which the tax is imposed.

Pursuant to these statutory provisions, petitioner set up on its books of account as of December 31, 1943, before closing its books for the calendar year 1943, a franchise tax in the amount of \$43,174.36. This was the correct tax computed for its "taxable year" 1944 on the basis of

its net income for the “income year” 1943. As will now be shown, petitioner was *required* so to accrue its liability, if its books, on the accrual basis, were to show a true picture of its legal liabilities as of December 31, 1943.

It is well settled that the Legislature has power to establish the lien and accrual date for taxes imposed by it, at any time chosen by it, even though such designated time is prior to the taking of the necessary steps to fix the amount of the tax, and prior to the commencement of the period *for* which the tax is imposed. And when the accrual and lien date is specified in the taxing statute, this fixes the time when *liability* accrues and the *lien* in support thereof attaches. This is true not only as between the taxing entity and the taxpayer, *i. e.*, for purposes of enforcing payment of the tax by the tax debtor, but is also true for purposes of establishing the respective priorities as between the taxing agency and other creditors of the taxpayer.

Thus, it was held by this Court in *United States v. Sampsell* (C. C. A. 9, 1946), 153 F. (2d) 731, that the provisions of the California Franchise Tax Act—as in effect in 1939 and 1940⁷—establishing the accrual and lien date as of the first day of the “taxable year,” created a valid and effective lien on the property of the taxpayer, and that this lien was entitled to priority, in a bankruptcy proceeding involving the taxpayer, over the later-attaching lien of the Federal tax. The Federal government there contended that, since the statutory lien of the California tax attached before the tax was assessed, and was therefore “inchoate,” whereas the lien of the Federal tax was

⁷Act, Secs. 2(7) and 29, as amended by Cal. Stats. 1939, pp. 960, 979.

“specific,” the latter lien was entitled to priority notwithstanding the former attached at an earlier date. This Court held, however, that under the local law *the state’s lien was valid and effective at the date specified in the statute, and that the state lien was therefore superior.* The same conclusion undoubtedly would have been reached if the accrual and lien date of the California franchise tax had been only a *single day* in advance of the effective date of the liens of the United States.

It is to be observed that, even under the Act as involved in the *Sampsell* case, the *amount* of the California franchise tax which accrued and became a lien on the first day of the “taxable year” *might* have been reduced *if* the taxpayer completely terminated its business and dissolved (other than by way of a “reorganization”), during the “taxable year.” Yet this “contingency” did not, in the opinion of this Court in deciding the *Sampsell* case, have anything to do with the validity or effect of the lien. The Legislature having prescribed that liability should accrue, and that the lien in support thereof should attach, as of the first day of the “taxable year,” any *subsequent* events which *might* conceivably affect the amount of the tax were clearly in the nature of conditions subsequent, which did not affect the validity and effect of the lien for the tax at the earlier date. Further reference to this “contingency” as to the final *amount* of the tax will be made hereinbelow in discussing, separately, its effect upon the right of petitioner to a *deduction* for the amount which it accrued on its books. For the present we are considering only the

effect of the statutory accrual and lien date from a business and accounting standpoint.

See, also, as to the validity and effect of tax liens under the California law, *County of San Diego v. County of Riverside* (1899), 125 Cal. 495, 58 Pac. 81, and *In re Knox-Powell-Stockton Co.* (C. C. A. 9, 1939), 100 F. (2d) 979, both of which cases are cited with approval by this Court in its decision in the *Sampsell* case, *supra*. The *San Diego* case involves the question of the effective date of a lien for property taxes. The *Knox-Powell-Stockton* case involves the validity and priority of the lien for a California tax based on oil production, as against a claim of the United States in a bankruptcy proceeding. As in the *Sampsell* case, *supra*, this Court held that the statutory lien was valid and effective and gave the state priority over the later claim of the United States, notwithstanding at the statutory lien date the amount of the state tax not only was not fixed but was not ascertainable because it was prior to the taking of the necessary steps for the assessment of the tax. Furthermore, the lien date in the *Knox-Powell-Stockton* case was prior to the period for which the tax was imposed.

Although the *Sampsell* case, *supra*, directly involved the California Franchise Tax Act as in effect prior to the 1943 amendments, there is no reasonable basis for saying that the Legislature does not equally have the power to designate the *last* day of the "income year" as the accrual and lien date, as was done by the 1943 amendments. Certainly, as shown by the decision of this Court in the *Knox-*

Powell-Stockton case, it could not be said that the fact that the lien date specified in the 1943 amendments is prior to the period *for* which the tax is imposed requires a determination that the lien is invalid or is ineffective as of the designated lien date.

Nor is there anything so inherently “unreasonable” in the date specified in the 1943 amendments as to justify a disregard thereof. Thus, even if it were to be assumed, for the purpose of argument, that there is an implied limitation upon the power of the Legislature to the effect that it may not specify an accrual and lien date which does not bear a reasonable relationship to the realities of the situation as evidenced by the remaining provisions of the taxing statute, such limitation would be inapplicable in the present case. For the last day of the “income year” is at least *as reasonable* a date for the Legislature to specify as the date for the accrual of the tax, as is the first of the taxable year. Under the California Franchise Tax Act, *there is not a single factor which exists with any MORE certainty on the FIRST day of the TAXABLE year than on the LAST day of the INCOME year.* The same “contingencies” exist on either date. To say, under such circumstances, that the Legislature *cannot* effectively provide that liability for the tax shall accrue and that the lien in support thereof shall attach on the last day of the “income year,” but that it *can* provide for such accrual and lien on the first day of the “taxable year,” would, indeed, be splitting the proverbial hair.

There can be no question, then, that if the statutory provisions designating the last day of the “income year”

as the date for the lien to attach had been before this Court in the *Sampsell* case, such provisions would have been held valid and of *equal effect* to the designation of the first day of the “taxable year,” which was upheld in that case.

The Tax Court, in its decision herein, held that the accrual and lien provisions of the California Franchise Tax Act “* * * do not affect the question of accrual for Federal tax purposes” for the reason that “These provisions of the Act, in our opinion, *only* have significance in terms of priority of liens * * *.”⁸ [R. 58, emphasis added.] We will discuss hereinbelow the propriety of this interpretation as it affects the right of petitioner to a deduction for Federal tax purposes. It is referred to at the present time only to consider its effect in regard to the question of the proper method to be followed by petitioner in *accruing upon its books of account* its liability for the franchise tax based on its 1943 income.

It will, of course, be observed that even the Tax Court concedes, in effect, that the provisions of the Act did, at least, “* * * have significance in terms of priority of liens * * *.” [R. 58.] It clearly could not do otherwise in the light of the *Sampsell* and *Knox-Powell-Stockton* decisions, *supra*.

Necessarily, however, to have even *this* effect there must have been a *liability* to have been *supported by* the lien.

⁸This language has been revised in the official published (but as yet unbound) version of the Opinion [see 9 T. C. 134], to be in the singular, but without changing the effect thereof.

See *East Bay Municipal Utility District v. Garrison* (1923), 191 Cal. 680. There, in holding that a tax lien was invalid because the municipal corporation purportedly imposing the tax was not in existence at the date of the alleged lien, the California Supreme Court said (pp. 692-693):

* * * A lien, according to its general definition, is a charge imposed upon property as security for the performance of an act or obligation. (Civ. Code, secs. 2872-2875, incl.) The lien of taxes differs in no respect from other liens in that it must rest upon an obligation to do the particular act which its attachment to the property of the obligee, or another, secures. In order, therefore, for the lien of taxes to be legally imposed upon property as of the first Monday in March of any particular year it is essential to the fixation of such tax lien upon such property as of said date not only that the property itself should be in existence at the time of the attachment of such lien but also that there should be at such time an existing obligation to pay the particular tax which the lien thus imposed is to secure. Otherwise the lien would have no foundation upon which to rest and would, by the imposition of an encumbrance having no obligation to support it, amount to the taking to the extent of such encumbrance of the property of the citizen without due process of law.

* * *

See, also, *County of San Diego v. County of Riverside*, *supra*, where, in holding that property taxes were payable to the county in which the property was included at the

time the lien attached, notwithstanding there had not then been any valid assessment of the tax, the Court said (p. 500) :

The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, *and the obligation to pay necessarily accrues at the same time, if not earlier.* (Emphasis added.)

If, then, there was such statutory *liability, supported by* a statutory lien having the effect indicated by the *Sampsell* case, it is difficult to perceive how it could be said that petitioner had any alternative but to set up this liability on its books of account as of December 31, 1943. Certainly, there is no accrual method of accounting worthy of the name which would justify the taxpayer in omitting to set up on its books of account as of the date specified in the statute, a liability which is supported by a lien which is superior to any subsequently attaching lien of even the United States. The taxpayer could not say that its liability for the tax accrued at some indefinable time in 1944, when the taxing statute states, without limitation, that the tax accrues and becomes a lien on December 31, 1943. If petitioner had omitted from its accounting statement as of December 31, 1943, its liability for the franchise tax based on its 1943 income, the statement would have been directly contrary to the law and would have presented an entirely erroneous picture of its legal liabilities as of that date to its stockholders, creditors, and others.

III.

Petitioner Was Entitled to a Deduction, in Its Federal Tax Return for 1943, for the California Franchise Tax Which It Accrued on Its Books on December 31, 1943, on the Basis of Its 1943 Net Income.

It being abundantly clear that, under the provisions of the California Franchise Tax Act petitioner could not properly have done otherwise than to accrue, as it did, on its books of account as of December 31, 1943, its liability for the franchise tax based on its 1943 net income, the only remaining question is whether the Internal Revenue Code requires, or permits, the respondent to disallow a *deduction* for such liability by petitioner, in computing its excess profits tax for its calendar year 1943, and to allow, instead, such a deduction in 1944. There are several factors which we will consider separately in demonstrating that the proper answer to this question is no—a very *emphatic* no.

A. Local Law Is Controlling as to When a Local Tax “Accrues” for Purposes of a Deduction Under the Internal Revenue Code.

Section 23(c)(1) of the Internal Revenue Code provides that in computing net income there shall be allowed as deductions, taxes “paid or accrued” within the Federal taxable year (with the exception of certain types of taxes not here involved). It is firmly established that the question as to when local taxes “accrue,” for purposes of this provision, must be determined by a reference to the provisions of the local taxing statute. See *Ma-*

gruder v. Supplee (1942), 316 U. S. 394, 62 S. Ct. 1162, 86 L. Ed. 1555. See, also, Randolph Paul, *Selected Studies in Federal Taxation*, Second Series (p. 23), where it is pointed out that the Federal statute, by "necessary implication," makes the state law controlling. The author says, further, that "It is *impossible* to determine when taxes accrue *except* by reference to the local acts imposing the taxes." (*Id.*, p. 24; emphasis added.)

While this principle is so incontrovertible that it should not even require the citation of authority in support thereof, it is submitted that, as pointed out to the Tax Court herein, a great deal of the apparent confusion in regard to the deduction allowed by Section 23(c) of the Internal Revenue Code for taxes paid or accrued, is the result of the persistent efforts of the Commissioner to set up his own standards as to who is liable and as to when liability accrues, rather than to follow the local law. In fairness to the Commissioner it would have to be conceded that sometimes this may be the result of the uncertain terms of the local taxing statutes. At other times, however, it is clear that in attempting to set up his own standards as to when taxes accrue the Commissioner is motivated by nothing better than a desire to simplify his administrative problems. Thus in *Commissioner v. LeRoy* (C. C. A. 2, (1945), 152 F. (2d) 936, in affirming a decision of the Tax Court allowing the purchaser of New York real property to deduct taxes paid by him and which, under the local law, became a lien after he acquired title to the property, the Court pointedly stated:

In the brief for the petitioner we are told that inasmuch as the "transactions in New York City real estate are so numerous that the question is one of great importance," the Commissioner has brought this

petition "in order to establish a clear, definite and workable rule for the federal administration of its income tax laws with respect to when New York City real estate taxes become a liability, are accruable, are deductible and by whom, when real property is sold or transferred." *The idea seems to be that there should be a federal rule establishing a uniform date determinative of the enumerated questions.* Cf. *Estate of Rogers v. Commissioner*, 320 U. S. 410, 64 S. Ct. 172, 88 L. Ed. 134; *Lyeth v. Hoey*, 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119, 119 A. L. R. 410; *Burnet v. Harmel*, 287 U. S. 103, 53 S. Ct. 74, 77 L. Ed. 199. These cases deal with instances in which the federal law and not the state law controls as to what is taxed. *But the present issue concerns the right to a deduction and taxes which may be deducted under §23(c)(1) of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code, §23(c)(1), are often, as in this instance, laid by taxing authorities other than the federal government. Then what are taxes and who is the taxpayer depends upon local law. We see no escape from the resulting difficulties in administration.* (152 F. (2d) at p. 937.) (Emphasis added.)

Despite this cogent statement, however, the Tax Court has itself apparently been led into the error, in the present case, of attempting to establish some sort of universal rule for fixing the accrual date for *all state franchise taxes*, regardless of what the controlling local law may expressly provide as to the date on which the liability accrues and on which a lien therefor attaches. Thus, as

its final reason in support of its conclusion that the California franchise tax does *not* accrue on the date specified in the California statute as the time when liability for the tax shall accrue and the lien in support thereof shall attach to the real property of the taxpayer, the Tax Court says that the ruling of the Commissioner in I. T. 3646, C. B. 1944, p. 104—that the tax accrues at some indefinite time in the subsequent “taxable year”—is proper “and is consistent with the treatment accorded other state franchise taxes.” [9 T. C. 134-135, R. 59.]

In support of this statement the Tax Court cites numerous other rulings by the Commissioner relating to *other* states. There is absolutely nothing in the Internal Revenue Code or in the decisions thereunder that warrants such complete disregard of the provisions of the *California* law on this subject. Here we are not concerned with the problem of when Illinois, or Kentucky, or Maryland, or Massachusetts, or Michigan, or Oklahoma, or Pennsylvania, or Tennessee, franchise taxes accrue—unless, of course, it can be shown that the statutes in those states contain *provisions in regard to the accrual of the tax and the lien in support thereof* which are similar to the provisions in this regard in the *California* statute. And an analysis of the rulings cited by the Tax Court [R. 59] discloses that none of the statutes there involved had accrual and lien provisions similar to those in the California Franchise Tax Act as amended in 1943. It does not afford any justification for the Tax Court’s disregard of the provisions of the California Act to say that the result obtained, for Federal tax purposes, is “consistent with the treatment accorded other state franchise taxes.”

B. Where There Is a Specific Accrual and Lien Date in the Local Law, That Date Controls as the Accrual Date for Federal Tax Purposes.

Of course, even if it is fully recognized that the provisions of the local taxing statute control as to when a tax, which is imposed thereby, accrues for purposes of a deduction under the Internal Revenue Code, the question remains as to how the "accrual" date is to be identified under the local law. Certain general principles will first be stated—in large part merely for purposes of contrast with the principles applicable to the facts herein—and cases in support of said principles applicable herein will then be discussed.

There has been considerable confusion in the rulings of respondent and in the decided cases in regard to just how the "accrual" date under the local law is to be identified. This may in large part be due to the fact that many taxing statutes do not *specify* either an accrual or a lien date. In such cases it is *necessary* to consider the nature and character of the tax, and the manner in which, and the period for which, it is imposed, and any other relevant factors in order to determine when *liability* arises. Even in such cases, however, it is *not* necessary that the tax should have been *assessed*, and the amount thereof finally *determined*, in order that it may be found that liability exists.

But the methods of determining the accrual date when the taxing statute does not contain any express designation of either an accrual or a lien date, are not applicable when the taxing statute does contain such express provisions. Manifestly, in the latter case the same problems

do not exist. The ultimate problem, of course, is to determine when *liability for the tax arises under the statute*.

The “liability” for a tax may be personal to the taxpayer, or it may be restricted to the specific property taxed or to the property subjected to the lien, or it may be both a personal liability and liability of property for the tax. Personal liability may, of course, arise without there being any lien. But the converse is never true. *If there is a lien, then there must be liability*—even though the liability may be limited to the property subject to the tax.

Accordingly, if the statute expressly provides for the *liability* to arise at an earlier date than the time specified for the *lien* to attach, that *earlier* date is when the tax *accrues* for purposes of the Internal Revenue Code. Likewise, even if the statute does not *specify* any accrual date, but from a consideration of all of the provisions of the statute it is apparent that *liability* has arisen prior to the date specified for the lien to attach, this earlier “date of liability” is when the tax “accrues.”

Where, however, as here, the statute specifies a *single* date as the date when liability for the tax shall arise *and* the lien in support of such liability shall attach to all of the real property of the taxpayer, there can be no question but that *that* is the “accrual” date for purposes of determining when the deduction allowed by Section 23(c) (1) of the Internal Revenue Code must be taken.

There are innumerable cases which could be cited upon the foregoing propositions. It is sufficient, however, to refer to the leading Supreme Court decision, and to certain cases applying the same principle to California taxes.

Magruder v. Supplee (1942), 316 U. S. 394, 62 S. Ct. 1162, 86 L. Ed. 1555;

California Sanitary Co., Ltd. (1935), 32 B. T. A. 122;

Crown Zellerbach Corp. (1941), 43 B. T. A. 541 (App. by Commissioner to C. C. A. 9, dismissed on stipulation, 6-29-42, 30 A. F. T. R. 1630).

These cases clearly establish, or recognize, the principle that taxes “accrue,” for Federal income tax purposes, in the Federal taxable year in which falls the date on which personal liability for the tax arises, or in which a lien therefor attaches, whichever is earlier. They also show that this principle applies regardless of whether the tax in question is imposed *for* a taxable period which falls in a *subsequent* Federal taxable period, and regardless of whether, at such accrual date, the *amount* of the tax is due and payable, or is fixed and assessed, or is even *ascertainable* on the basis of facts then known. They thus provide the controlling principles for a decision herein.

The Tax Court, in its Opinion rendered in the present case, declined to follow the principles enunciated in the above-cited decisions. Its various reasons for rejecting said decisions will now be separately considered.

The first, and broadest, ground on which the Tax Court rejected said decisions was that they were distinguishable for the reason that they “* * * involve gen-

erally the question of *who* was liable for local property taxes *as between transferor and transferee.*" [9. T. C. 132; R. 53.] (Emphasis added.) It is true that the first two—but only the first two—of the cited cases (*Magruder v. Supplee* and *California Sanitary Company, Ltd., supra*), did involve the question of who was entitled to a deduction, for Federal tax purposes, of property taxes paid by a person who purchased the property and paid taxes which became a lien before the date of purchase. It is not apparent, however, why this prevents the principle established therein from being applicable to cases involving the deduction of taxes where no transfer of property is involved.

In the cases involving the right of a *purchaser* to deduct the property taxes paid by him, the courts, although ultimately deciding the question of *who was liable* for the taxes as between transferor and transferee, are also necessarily determining *when the liability for the tax accrued.* If liability for the tax accrued *prior* to the transfer of the property, then, manifestly, it was not the tax of the *transferee*, and so could not be deducted by him. However, it would seem to be clear that if the tax thus *accrues on the lien date* for purposes of determining *who* is entitled to a deduction therefor as between the seller and the purchaser, it must also *accrue on the lien date* for purposes of determining *when* it is deductible by a taxpayer on the accrual basis, even if no transfer of the property is involved.

In fact, it is squarely so held in the *Crown-Zellerbach* case, *supra*, notwithstanding the Tax Court has lumped that decision with *Magruder v. Supplee* and *California Sanitary Corp., Ltd., supra*, in distinguishing all of said

cases from the case at bar upon the bare ground that these cases “involve generally the question of who was liable for local property taxes as between transferor and transferee.” The *Crown-Zellerbach* case involved, amongst other taxes, property taxes imposed by the State of California. These taxes became a lien on the first Monday in March but were levied *for*, and paid in, the state fiscal period commencing the following July first and ending on June 30 of the next calendar year. The taxpayer in that case kept its books of account on the basis of a fiscal year ending April 30, and used an accrual method of accounting. *The question presented to the Board was the proper year in which to deduct these taxes.*

The taxpayer, in the cited case, contended that it should be permitted to deduct in its fiscal year ended April 30, 1937, ten-twelfths of the California taxes which became a lien on the first Monday in March, 1936, and were *for* the State fiscal year July 1, 1936, to June 30, 1937—*because* ten-twelfths of that State fiscal period fell within said fiscal year of the taxpayer. In other words, the taxpayer’s theory was, as is apparently the theory of the decision of the Tax Court herein, that taxes must be deducted in the taxpayer’s accounting period in which falls the period *for* which the taxes are *imposed*.

The Commissioner, however, contended that taxes were required to be deducted in the year in which they *accrued*, and that they accrued in the taxpayer’s fiscal year in which fell the *lien* date prescribed by the local law. Thus, in the cited case, his contention was that the taxpayer was required to *deduct* in its fiscal year ended April 30, 1937, the California taxes which became a lien on the first Monday in March, 1937, notwithstanding they

were *for* the period July 1, 1937, to June 30, 1938. *The Board upheld the Commissioner.* This is directly opposed, in principle, to the decision of the Tax Court in the case at bar.

Clearly, this first purported ground of distinguishing the “property tax cases,” *i. e.*, upon the ground that they merely involve “the question of who was liable for local property taxes as between transferor and transferee,” is without merit.

The Opinion of the Tax Court further attempts to distinguish the above-cited “property tax cases”—holding that property taxes accrue when a *lien* therefor attaches—upon the ground that “The nature and character of the franchise tax herein is essentially different from the property taxes involved in the above discussed cases.” [9 T. C. 132; R. 54-55.] Of course, it is true that the two types of taxes differ in many respects. But the question is *not* whether the *taxes* involved in the cited cases are similar in their nature to those involved herein. Rather, it is whether the *statutory provisions identifying the date when “liability” for the taxes arises* are similar. For the ultimate question with which we are concerned—and this must be borne in mind at all times—is, When did *liability* arise?

If the taxing statute contains neither accrual nor lien date, then it is manifestly proper to determine when “liability” arises from all of the provisions of the statute, including a consideration of the nature and character of the tax and of the period *for* which the tax is imposed (*e. g.*, *United States v. Anderson*, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347). On the other hand, if the taxing statute contains a lien provision, then it is clear that

liability must have arisen, at the latest, by the date specified for the lien to attach. (*East Bay Municipal Utility Dist. v. Garrison, supra.*) However, even if there is a lien provision in the taxing statute, “liability” *may* arise at an *earlier* date than that specified for the lien to attach. Accordingly, if there is a lien provision but no express provision as to the date when “liability” arises, it is still proper to determine the latter date by a study of all of the provisions of the statute to determine whether “liability” in fact arose at an *earlier* date than that specified for the lien to attach (*e. g., S. E. Bernheimer, 41 B. T. A. 249; aff’d, per curiam (C. C. A. 2), 121 F. (2d) 454.*

When, however, as in the California Franchise Tax Act, the taxing statute expressly designates a single date as the date when liability for the tax accrues *and* when the lien in support of such liability attached to the property of the taxpayer, *that date is controlling* in determining when liability for the tax accrues for Federal income tax purposes. The same is necessarily true regardless of the “nature” of the tax. *Otherwise, full effect is not being given to the provisions of the controlling local law.* In such case there is no occasion for “interpretation” of the tax statute, to determine when “liability” arises for the tax imposed thereby—either by reference to the nature and character of the tax or by a consideration of any other provisions. When the provisions as to both liability and lien date are clear and unequivocal, *those provisions must be applied as they are written.* By hypothesis, there can be no *other* “state law” on the subject—and, as stated hereinabove, the Federal income tax law in regard to deductions for state taxes necessarily adopts by reference the state law as to the date when “liability” arises. What-

ever may be the propriety of looking to the “nature and character” of the tax to determine when “liability” arises under a statute which does *not* expressly designate a date when liability arises and when a lien in support thereof attaches, *this is not such a case.*

Manifestly, in disregarding the express provisions of the Franchise Tax Act designating the last day of the “income year” (here 1943) as the date when liability for the tax accrues and the lien in support thereof attaches to the real property of the taxpayer, and in deciding the case, instead, on the basis of its determination as to the “nature and character” of the franchise tax, the Tax Court, has in the language of the *Security Flour Mills* case, *supra*, “misconstrued the extent” of its powers. It is not within its power to “interpret” the local law to find a date when liability thereunder arises which is at variance with the clear and unequivocal provisions of the taxing statute. Nor is it within its power to “interpret” the Internal Revenue Code as requiring the accrual of taxes at some date *other* than the date when liability arises under the local law.

C. A Disregard of the Statutory Accrual and Lien Date Is Not Required by Reason of Any “Contingencies” as to Liability for, or Amount of, the Franchise Tax on the Last Day of the Income Year.

In discussing the nature of the franchise tax involved herein, the Tax Court further states that, under the terms of the Act, withdrawal or dissolution may relieve the taxpayer from taxation for the portion of the “taxable year” during which the franchise privilege is not exercised. [9 T. C. 133, R. 55.] Throughout its Opinion the Tax Court places great emphasis upon this alleged “contin-

gency” affecting the amount of the tax which may ultimately be required to be paid. It is submitted, however, that the Tax Court has misinterpreted the Act in regard to the existence and extent of the alleged “contingency” here involved and also has misconstrued its power to disallow a deduction upon the ground that the liability involved is subject to a “contingency.” Each of these errors will be separately considered.

(1) *Extent of the Right, Under the California Franchise Tax Act, to a Refund in the Event of Dissolution During the “Taxable Year.”*

The Tax Court states that if *no* business operations were carried on by the taxpayer in the “taxable” year “the tax would not be imposed.” [9 T. C. 133, R. 55.] This clearly is not a correct interpretation of the California law. The Franchise Tax Act unequivocally provides that *every* corporation shall pay a *minimum* annual tax of twenty-five dollars. This is not only expressly stated at two separate points in the section of the Act imposing the tax (Act, sec. 4(3) and (5); Appendix, p. 4), but is repeated in the section providing for a refund of a proportionate part of the tax in the event of a withdrawal or dissolution before the end of the “taxable” year. (Act, sec. 13(k); Appendix p, 11.) See also the Franchise Tax Commissioner’s interpretation in his Regulation Art. 29-1, paragraph 2. (Cal. C. T. par. 8-053, Appendix p. 18.)

Thus, under a correct interpretation of the California statute, the obligation to pay at least the amount of the minimum tax is inescapable in any case in which the taxpayer has failed to withdraw or dissolve *by the last day of the “income year.”* Therefore, even if the question of

“liability” were to be determined by reference to provisions of the Act other than those designating the accrual and lien date, and even if the test as to whether that liability is “contingent” is whether there is a liability which the taxpayer is completely and irrevocably bound to satisfy, this test is met on December 31, 1943, under the law and the facts in the present case. Here, the *maximum* possible effect of the happening of the “contingency” in the California statute, viz., dissolution or withdrawal in 1944, would be to enable the corporation to reduce the *amount* of the tax based on the income of the “income year” which it would otherwise be required to pay.

(2) *Extent of Tax Court Power to Disallow a Tax Deduction as Being Only a Contingent Liability.*

It is not conceded, however, that the Tax Court has applied the proper *principle* as to “accruals,” even if it were assumed, for the purpose of argument, that its interpretation of the *effect of the state law*, in the foregoing respect, were correct. The following argument is therefore presented as being equally applicable under *either* interpretation of the state law, *i. e.*, regardless of whether the “contingency” specified in the state law may result in a refund or abatement of the *entire* tax based upon the net income of the “income year,” or may result in a refund or abatement of a part only of said tax.

It is true, of course, as a broad general principle, that “contingent liabilities” may not be deducted, for Federal income tax purposes. But, as in the case of most broad general principles, this must be applied with discernment, else its true purpose be distorted.

In the first place, it must be remembered that the question whether a liability is “contingent,” in the sense which

is required before a deduction thereof may be disallowed, must be answered in the light of the events known or which reasonably should have been known as of the close of the Federal taxable year. Thus, in *Baltimore Transfer Co.*, 8 T. C. 1, the Tax Court,⁹ in upholding a tax deduction in the amount accrued notwithstanding a subsequent reduction in the amount of the tax, succinctly stated:

*The propriety of the accruals must be judged by the facts which petitioner knew or could reasonably be expected to know at the closing of its books for the taxable year * * *. (8 T. C. at 7; emphasis added.)*

Likewise in *Helvering v. Russian Finance & Construction Corp.* (C. C. A. 2, 1935), 77 F. (2d) 324, in upholding a deduction for royalties paid pursuant to a contract notwithstanding under the contract future events might cancel the liability, the Court said (77 F. (2d) at 327):

** * * The possibility that a present liability may subsequently be discharged by some condition subsequent does not prevent its accrual on the taxpayer's books. The test is whether a taxpayer is justified in entertaining a reasonable expectation that an expense will be incurred. The taxpayer's liability became fixed upon delivery of the ore, and there then existed reasonable grounds to justify the taxpayer in believing that it would ultimately have to pay the \$1,200,000. A presently existing obligation, which the taxpayer has reasonable grounds to believe must eventually be fulfilled, is not uncertain or contingent in the sense that it may not be accrued. See Automobile Ins. Co. v. Comm'r, 72 F. (2d) 265 (C. C. A. 2).*

⁹In an Opinion by the same Judge who wrote the Opinion in the case at bar. The Commissioner has acquiesced in the decision in the *Baltimore Transfer* case.

The basis of the accrual system of accounting is that obligations incurred in the normal course of business will be discharged in due course. *United States v. American Can Co.*, 280 U. S. 412, 50 S. Ct. 177, 74 L. Ed. 518. This is a necessary assumption. Conditions in the contract which would here have discharged the taxpayer from the liability it incurred upon delivery of the ore were not of a nature which would justify it in believing it would not have to pay the \$1,200,000. The conditions never occurred, as the record disclosed, and the liability was in fact discharged by payment. *When books are kept on an accrual basis, a presently existing obligation which, in the normal course of events, the taxpayer is justified in believing he must fulfill, may be accrued.* The existence of an absolute liability is necessary; absolute certainty that it will be discharged by payment is not. *Spring City Foundry Co. v. Comm'r*, 292 U. S. 182, 54 S. Ct. 644, 645, 78 L. Ed. 1200.

By way of summary, then, the controlling principles in regard to accrual of "contingent" liabilities are as follows. If at the close of the Federal taxable year the very existence of "liability" is contingent upon the happening of events which have not yet occurred, accrual is *not* proper on the basis of the facts then known. Such a contingency is in the nature of a condition precedent to the liability. Accordingly, the non-occurrence of such a contingency leaves a status of "non-liability."

On the other hand, if at the close of the Federal taxable year "liability" does exist, but the question of how much, if any, of the liability may be required to be *satisfied* may be affected by future events, then accrual *is* proper *if* on the basis of the facts then known the taxpayer has

reasonable grounds to believe that his liability must eventually be fulfilled. The contingency in regard to the amount which will be required to be paid is, in such a case, in the nature of a condition subsequent. The propriety of the accrual must necessarily depend upon the likelihood of the condition occurring to *defeat* the status of “*liability*” which would otherwise exist.

Contrary to popular assumption, the payment of taxes is not always inevitable. There are many “contingencies” which may occur to reduce or discharge the liability without the necessity for payment in full. And in such cases, as in cases involving other types of obligations, the foregoing principles in regard to the effect of any “contingency” upon the propriety of an accrual of the obligation are applicable. In other words, if there is “liability” at the close of the Federal taxable year but there is a “contingency” in the nature of a condition subsequent which may reduce or defeat that liability, the propriety of accruing the liability depends upon the likelihood, under the facts known or which reasonably should have been known at the close of the taxable year, of the contingency occurring.

Thus, in *North Shore Bus Co.* (T. C. Memo. 1-27-43), P.-H. T. C. Memo. Dec. par. 43,041, C. C. H. Dec. 12,944-B (1 T. C. M. 493), it was held that the deduction of a New York City excise tax on gross income in the amount accrued on the taxpayer’s books, was proper notwithstanding the liability was in fact subsequently settled for less than the amount accrued, the settlement being based on inability to pay rather than because the taxpayer was contesting liability for the tax. This decision was affirmed, on a petition for review by the Commissioner, but without discussion of the above point,

in *Commissioner v. North Shore Bus Co.* (C. C. A. 2, 1944), 143 F. (2d) 114. Similarly, in *Manhattan Soap Co.* (T. C. Memo. 3-22-44), P.-H. T. C. Memo. Dec. par. 44,092, C. C. H. Dec. 13,825(M) (3 T. C. M. 257), it was held that where Federal processing and excise taxes were not contested by the taxpayer but were settled under a compromise agreement for a smaller sum because of the taxpayer's financial condition the taxpayer was nevertheless entitled to a deduction of the full amount of the taxes, as accrued on its books.

In *Baltimore Transfer Co.*, 8 T. C. 1, a deduction was allowed for the amounts accrued and paid by taxpayer as its liability under the Maryland Unemployment Compensation Law, notwithstanding the taxpayer thereafter received a refund of a portion thereof pursuant to a new interpretation by the state board as to the correct tax rate applicable to taxpayer. The Court said (8 T. C. at pp. 6-7):

* * * In our view, its obligation to pay the full amount deducted was sufficiently certain at the close of the taxable year to justify its accrual, whereas the right to receive the refund credit became final, if at all, in the following year.

* * * * *

It is apparent from the stipulated facts that petitioner neither denied nor questioned its liability for any portion of the accrued sums and had no reason prior to April 21, 1944, even to suspect that it might subsequently receive or be entitled to receive a refund or credit thereof. * * * The propriety of the accruals must be judged by the facts which peti-

tioner knew or could reasonably be expected to know at the closing of its books for the taxable year, and under the circumstances here we think that the accruals must be regarded as proper.

It is apparent, of course, that in none of the foregoing cases could the particular reason for the reduction in the amount of liability have been expressly recognized in the taxing statute. However, the cited cases clearly show that such “contingencies” do exist with respect to *all* taxes. The fact that they are not specified in the statute is of importance only as evidence that the “contingency” could not have been in the nature of a condition precedent to liability, but was in the nature of a condition subsequent. Accordingly, the accrual must stand in accordance with the facts as of that date, without regard to the effect of “contingencies” which every taxpayer knows *may* affect the amount which will be required to be paid in *discharge* of its liability.

It has also been held that deductions for taxes should be allowed in the year in which paid or accrued notwithstanding the taxing statute was subsequently held unconstitutional (*Charles F. Fawcett*, 30 B. T. A. 908; *Cartex Mills, Inc.*, 42 B. T. A. 894 (N. A., 1942-2 C. B., p. 22; G. C. M. 22404, C. B. 1940-2, p. 204).) unless, of course, the taxpayer is himself *contesting* the tax at the time he attempted to *accrue* it. (*Dixie Pine Products Co. v. Commissioner* (1944), 320 U. S. 516, 64 S. Ct. 364, 88 L. Ed. 270.) In the *Cartex Mills* case, *supra*, after stating that “It has been frequently said that taxation is a practical matter * * *,” the Board said (p. 898):

* * * To conclude, in an interpretation of the revenue acts, that substantial amounts paid pursuant to a taxing statute, vigorously enforced by the

sovereign and not declared unconstitutional until a later year, are not "taxes paid or accrued within the taxable year" within the meaning of the revenue act would be, by way of understatement, highly impractical.

To the same effect see I. T. 3149, C. B. 1938-1, p. 124, holding that taxpayers who did not contest the validity of the Carriers Taxing Act of 1935, and who accrued liability therefor on their books, were entitled to a deduction for this accrued liability in the year of accrual notwithstanding actual liability was subsequently extinguished by litigation conducted by other taxpayers.

Nor is any different result reached when the tax for which liability has attached is subject to reduction in amount by reason of the occurrence of some subsequent event which is expressly identified in the taxing statute. Thus, in *W. J. Bush & Co., Inc.* (T. C. Memo., 1-8-45), P.-H. T. C. Memo. Dec. par. 45,054, C. C. H. Dec. 14,390(M) (4 T. C. M. 194), the Court held, upon the concession of the point by the Commissioner, that a taxpayer on the accrual basis was entitled to deduct the full amount of British Excess Profits Taxes notwithstanding *the tax law* provided for the refund of a percentage thereof, *upon certain contingencies*, after the termination of hostilities in World War II.

Particularly enlightening on the point under discussion are the decisions in regard to the effect of the contingent nature of the Federal capital stock tax, imposed (prior to the repeal of this tax by Section 205 of the Revenue Act of 1945) by Section 1200 of the Internal Revenue Code. That tax was an excise tax upon corporations, based upon the "declared value" of their capital stock.

The tax was for “each year ending June 30.” (Sec. 1200-(a), I. R. C.) Returns were not required to be made, however, until “within one month after the close of the year with respect to which such tax is imposed.” (Sec. 1203(b) (1), I. R. C.) The corporation was required only to state *in the return* the value which it declared upon its capital stock “as of the close of its last income-tax taxable year ending with or prior to the close of the capital stock tax taxable year * * *.” (Sec. 1202(a), I. R. C.)

Thus, in July, 1940, a calendar year corporation would file its capital stock tax return for the capital stock tax taxable year ended June 30, 1940, declaring therein the “value” of its capital stock as of December 31, 1939. Manifestly, at all times up to the time of filing the return in July, 1940, it was entirely within the control of the taxpayer whether it would have to pay *any* capital stock tax. And yet, under the decisions of the Tax Court hereinafter cited, such capital stock tax was accruable as of July 1, 1939.

True, if the taxpayer didn't fix an adequate value to its capital stock for capital stock tax purposes, it would run the risk of becoming liable for a declared value excess profits tax at an even higher rate (see I. R. C. Secs. 600-605, prior to repeal by Revenue Act of 1945). But this would not be even a *practical* (let alone a legal) compulsion if the taxpayer, on a calendar year basis, *dissolved* before the commencement of the taxable year for which the capital stock in question is the measure of liability for the declared value excess profits tax. In such case the taxpayer could, with complete impunity, file a capital stock tax return showing *no* value to its capital stock and thus wipe out its entire capital stock tax liability for the pre-

ceding capital stock tax year. This would not result in any greater declared value excess profits tax liability, because the corporation would not be in business during the year for which the capital stock tax declaration is the preliminary measure of liability for the declared value excess profits tax.

For example, if a corporation was on a calendar year basis and dissolved on November 30, 1943, it would have been required to file a capital stock tax return for the capital stock tax taxable year ending June 30, 1944. However, since there would be no income during the income tax taxable year ending December 31, 1944, on which the "penalty" declared value excess profits tax might apply, the taxpayer could safely, in its capital stock tax return for the capital stock tax taxable year ending June 30, 1944, show no value and no tax.

Notwithstanding such contingency with respect to the capital stock tax liability throughout the capital stock tax taxable year, it is uniformly held (except where the taxpayer, by the accounting method adopted by him and consistently followed, accrued the capital stock tax monthly, see *Atlantic Coast Line R. Co.*, 4 T. C. 140), that that tax accrues on the first day of the capital stock tax year for which it is imposed. See *Budd International Corp.* (1941), 45 B. T. A. 737 (reversed on another point in *Budd International Corp. v. Commissioner* (C. C. A. 3, 1944), 143 F. (2d) 784), where the taxpayer in fact made several changes in the values reported for capital stock tax purposes, but it was held that liability nevertheless accrued on the first day of each capital stock tax year. See, also *Louisiana Delta Hardwood Lbr. Co., Inc.*, 7 T. C. 994, holding (in an opinion written by the Trial Judge herein) that the capital stock tax for the capital

stock tax year July 1, 1941, to June 30, 1942, accrued on July 1, 1941 notwithstanding the entire liability might have been eliminated by the taxpayer as late as July, 1942, by filing a return which declared no value for its capital stock.

Even the Commissioner has not seen fit to contend that the contingencies with respect to the capital stock tax render liability therefor so uncertain as to prevent accrual of the tax on the first day of the capital stock tax taxable year. In this connection see *Atlantic Coast Line R. Co.*, *supra*, where the Court said with reference to the proper accrual date for the Federal capital stock tax:

* * * Neither party contends that the amount of the tax, dependent as it is upon a future declaration of value and possible change in rate, is so uncertain at the beginning of the capital stock tax year that its accrual should be postponed to the end, and this would be inconsistent with what we held in *Budd International Corporation*, 45 B. T. A. 737; reversed other grounds (C. C. A., 3d Cir.), 143 Fed. (2d) 784. (4 T. C. 140, 150.)

The applicability to the facts herein, of the foregoing principles in regard to the accrual of taxes which are subject to certain "contingencies" as to amount or as to liability, is self-evident. In the first place, it is clear that under the express terms of the California Franchise Tax Act there is "liability" on the taxpayer as of the last day of the income year. This is the necessary effect of both the express provision in the Act as to *accrual* on that date and the express provision establishing the *lien* on that date. As demonstrated hereinabove, *there cannot be a lien without "liability."*

Thus, any “contingencies” which may occur—regardless of whether they affect the entire “liability” or merely reduce the tax to a lesser *amount*—are necessarily in the nature of *conditions subsequent*. They cannot, under the unequivocal terms of the Act, affect the existence of “liability” *at the close of the income year*.

Necessarily, then, the only remaining question is whether, under the facts known to petitioner, or which could reasonably be expected to be known to it, at the close of its state “income year,” *i. e.*, its Federal taxable year 1943, it was proper for petitioner to have accrued upon its books as of December 31, 1943, its liability for the full amount of the franchise tax based upon its 1943 net income.

The answer to this question—being based, as it must, upon reasonable probabilities and practical expectancies rather than according to theoretical and legalistic possibilities—is crystal clear: petitioner did properly accrue, on December 31, 1943, its *liability* for the full amount of the franchise tax which it knew it would be required to pay, and which it did pay, in 1944 in the normal course of events as a going business. The fact that, legally, it *could* dissolve and thereby affect the *amount* of such liability which it would have to satisfy, not only did not affect the existence of “liability,” but was such a remote contingency as to have no practical relationship in any way to its accrual on its books of liability for the entire amount of the tax on December 31, 1943.

Thus, the record shows that such an event—dissolution—not only was not reasonably likely to occur, but *did not* occur, with respect to petitioner. It has been *admitted by the pleadings* that at no time material hereto did the peti-

tioner have pending any negotiations for the possible sale of its Biltmore Hotel property, or contemplate dissolution or liquidation. In other words, as of December 31, 1943, it had no intention of liquidating or dissolving, or of disposing of any of its income-producing properties, in 1944, or at all. It intended to continue with the normal operation of its business in 1944, as in 1943. Necessarily, then, it must have intended to pay, in 1944, the full amount of the California franchise tax for 1944 based upon its net income in 1943, without abatement or reduction in any part on account of any dissolution of petitioner or at all.

Furthermore, petitioner did in fact operate throughout 1944, commencing with the first instant in that year, in the same manner in which it had operated in 1943, up to the last instant in that year. And it continued so to operate in succeeding years and is still so operating. It *paid*, in 1944, the full amount of the California franchise tax for 1944 based upon its net income in 1943, without abatement or reduction in any part on account of any dissolution of taxpayer or at all. It is admitted by the pleadings that petitioner has never at any time disputed its liability for the whole or any part of the California franchise tax based on its 1943 income, has never filed any claim for refund or credit with respect thereto, and has never had, and does not now have, any intention of filing any such claim.

In short, in the light of the facts as of the close of the "income year" (1943) there was not even a *remote* possibility of the petitioner not being required to pay in full the liability which the California Franchise Tax Act imposed upon it as of December 31, 1943. As heretofore stated, then, it would have been utterly unreasonable for

it to have failed to accrue the liability which all of the facts then known indisputably showed to exist under the controlling local law. And subsequent events have only borne out petitioner's then appraisal of the facts. Under these circumstances, there was not, on December 31, 1943, any such contingency as to petitioner's "liability" for the franchise tax based on its 1943 net income as would justify the refusal of respondent, and of the Tax Court, to allow a deduction, in petitioner's 1943 excess profits tax return, for the full amount of the tax so accrued.

D. A Disregard of the Statutory Accrual and Lien Date Is Not Required by Reason of the Fact That the Tax Is *for* a Subsequent Period.

The Tax Court, in its decision herein, apparently was of the view that taxes—franchise taxes, at least—*cannot* be accrued in a year other than the year *for* which they are imposed.

Thus, the Court said, “* * * the tax being for the privilege of doing business in the taxable year, the *liability* therefor arises only with and from the exercise of such privilege.” [9 T. C. 133, R. 55; emphasis added.] From a consideration of the entire Opinion, however, it is apparent that this statement was made only because the Court had concluded that the provisions of the Franchise Tax Act specifying the date when liability should accrue and when the lien therefor should attach to the real property of the taxpayer were to be disregarded. Manifestly, the Court could not have made the quoted statement if effect had been given to the accrual and lien provisions of the local law.

Also, in support of the proposition that the tax must be accrued in the year *for* which it is imposed, the Tax Court cited the cases of *United States v. Anderson, et al.*, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347; *Petaluma & Santa Rosa R. R. Co.*, 11 B. T. A. 541; *H. H. Brown Co.*, 8 B. T. A. 112; and *Durst Productions Corporation*, 8 T. C. 1326. Apparently these cases, too, were cited on the basis of the fundamental error of the Tax Court herein, in assuming that the express accrual and lien provisions of the California Franchise Tax Act were of no significance in determining the proper accrual date for Federal tax purposes. Clearly, the cited cases would *not support* the proposition that a tax must be accrued in the year *for* which it is imposed *if* the taxing statute expressly provides that liability shall accrue, and a lien in support thereof shall attach to the property of the taxpayer, at an *earlier* date.

United States v. Anderson, supra, involved the accrual and deduction of the Federal tax on income from munitions manufacture and sale. Apparently there was not any express provision in the taxing statute either identifying the time when liability for the tax arose or establishing a lien in support of the tax liability. The taxpayer set up a reserve for the tax as of the end of the income year, but nevertheless contended that it should not be required to deduct the tax until the following year because it was neither assessed nor due and payable until then. The United States contended that the tax accrued on the last day of the income year, and was therefore re-

quired to be deducted in that year. The Supreme Court, in holding for the United States, said (46 S. Ct. 131, 134):

Only a word need be said with reference to the contention that the tax upon munitions manufactured and sold in 1916 did not accrue until 1917. In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax all of the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it.

The language as quoted by the Tax Court herein from the opinion in the *Anderson* case was not used in the portion of the opinion relating to the specific question of the proper *time* to accrue taxes. Rather, it was used in connection with the Supreme Court's rejection of the taxpayer's preliminary proposition that the accrual provisions of the Revenue Act of 1916 *were not intended to be applied* to taxes at all.

Petaluma & Santa Rosa R. R. Co., *supra*, cited by the Tax Court, is a "property tax" case. The tax there involved was imposed on corporate property on the first Monday in March, but the amount of the tax was measured by the gross receipts of the preceding year instead of on an *ad valorem* basis. Thus, in *principle*, the case does not differ from the *California Sanitary Co.* case (32 B. T. A. 122) and the *Crown-Zellerbach Corp.* case (43 B. T. A. 541), cited by petitioner. Yet the Tax Court *distinguished those cases* upon the ground that they were mere "property tax" cases, saying [9 T. C. 132, R. 54]:

* * * None of these cases, in our opinion, is controlling of the question at hand because these cases

involve property taxes, the personal liability for which arises by virtue of ownership at a specified time.

The same could, of course, be said of the *Petaluma* case, *supra*, cited by the Tax Court.

In citing the *Petaluma* case as it did, however, the Tax Court apparently was of the view that the proper accrual date for *all* taxes *measured by income*—whether excise or property taxes—must be determined according to a universal rule, viz., according to the year *for* which the tax is imposed. The *Petaluma* case is not authority for any such proposition. All that the Board there held, or was required to hold, was that the tax there in question, which was based upon the ownership of the property on the first Monday in March, 1921, and which became a *lien* on that date, did *not* accrue in 1920 notwithstanding the tax was *measured by* the taxpayer's income for that earlier year. Manifestly, this does *not* require the conclusion that the *same* holding would, or should, be made where the taxing statute expressly provides that the tax shall accrue and become a lien on the last day of the year the income of which is the measure for the tax. Yet that is in effect the proposition which the Tax Court decided herein—purportedly on the authority, in part, of said *Petaluma* case. The cited case does not provide any support for the decision herein. If anything, it is in support of the petitioner's position that the statutory accrual and *lien* date is controlling.

H. H. Brown Co., *supra*, cited by the Tax Court herein, involved a deduction for the Massachusetts corporation excise tax in the taxpayer's Federal taxable year ended June 30, 1922. As disclosed in the opinion of the Board of Tax Appeals, the Massachusetts statute imposed what

the Massachusetts Supreme Court had denominated “an excise for the commodity of carrying on business.” (See 8 B. T. A. 112, 116.) The tax was assessed as of April first of the taxable year, and was based on “* * * the excess of the fair cash value on that date of the shares of capital stock over certain deductions plus the net income of the corporation as shown by its last Federal income-tax return.” (*Id.* p. 116.)

The Board determined, from decisions of the Massachusetts court, that the tax in question was an *obligation* of the corporation on and after April 1, 1922. (*Id.* p. 117.) The Commissioner apparently contended that the tax was not accruable or deductible in the taxable period ended June 30, 1922, however, because the exact amount thereof had not yet been ascertained and the tax was not yet due and payable. The Board held that these latter factors were immaterial where there was an *obligation* for the tax in the year in which the taxpayer sought to take the deduction. It was in this setting that the Board said, as quoted in the Tax Court Opinion herein [9 T. C. 134, R. 58]:

The basic idea under the accrual system of accounting is that the books shall immediately reflect obligations and expenses definitely incurred and income definitely earned without regard to whether payment has been made or whether payment is due. Expenses incurred in the operations for a particular year are properly accrued in the accounts for that year, although payment may not be due until the following year.

When this quoted language is read in the light of the decision which was rendered and in the full context in which it was written, it is clear that there is nothing in

such language or in the decision which supports or was intended to support the conclusion that taxes *must* be accrued and deducted in the year *for* which they are paid *regardless* of any provision in the taxing statute designating a date when liability accrues and a lien in support thereof attaches. On the contrary, the Board clearly held that taxes accrue when there is an “obligation” therefor. (And it is interesting to note that it rendered the *same* decision, and on the basis of the same reasoning, in regard to *both* property taxes and the franchise tax in question. See 8 B. T. A. 112, 117.) It is reasonable to conclude, then, that if the statute there before the Board had expressly designated an accrual and lien date, and thus established the “obligation” as of that date, the Board would have held that the taxes accrued at that date for purposes of a Federal income tax deduction.

It is not apparent why *Durst Productions Corporation, supra*, is cited by the Tax Court herein in connection with its discussion of the alleged requirement that the tax be deducted in the period *for* which it was imposed, unless it was because the Opinion in the cited case relies largely upon the decision in the *Anderson* case, *supra*, which the Tax Court also cites herein. However, since the *Durst* case is so cited by the Tax Court herein, it will be discussed at the present point in regard to all of its implications, regardless of the fact that some of the principles involved have already been separately treated in this brief, as it is difficult to consider the decision except in its entirety.

The *Durst* case held that the New York State franchise tax imposed under the law as amended on March 31, 1944, and based on the taxpayer's income for its fiscal period ended May 31, 1944, was deductible in the taxpayer's

Federal excess profits tax return for said fiscal period. In so holding the Court stated [9 T. C. 134, R. 58]:

The tax being calculated on the amount of earnings for the year in issue its charge against those earnings seems to accord with the theory of accrual.

The Tax Court quoted this language with approval in its Opinion herein. There is nothing either in the result obtained in the cited case or in the quoted language, which supports the conclusion reached in the present case, and in connection with which the *Durst* case was cited—that every franchise tax must be accrued only in the year *for* which the tax is imposed. In fact, the above-quoted portion of the Opinion certainly can be reasonably read as being strictly applicable in *favor* of petitioner herein. But petitioner is aware of the danger of placing too much emphasis upon language thus separated from the text in which it was used. It is therefore desirable to consider the cited case in more detail to see if it can be ascertained *why* the Court reached the decision which it did and to see whether these *reasons* have any applicability herein.

As is pointed out in a recent article devoted entirely to a discussion of the *Durst* case (Gerhard J. Mayer, "The Accrual Date of the New York State Franchise Tax," Taxes, Vol. 26, No. 1, p. 43), "Comment on the court's principal argument [the effect of the local law upon the accrual date] is rendered difficult by its failure to point to the specific provision of local law which it considered as decisive." It is clear, however, that the decision was rendered upon the theory that the local taxing statute there in question was strictly comparable to that which was involved in the *Anderson* case, *supra*. Accordingly, it must have been assumed in the *Durst* case that the statute there involved imposed a tax which was *for* the

same period as that *on the income of which* the tax was based. And the Tax Court herein expressly states that the tax in the *Durst* case is measured by the net income “of the year *for* which the tax is imposed * * *.” [9 T. C. 134, R. 58; emphasis added.]

But even if this is a correct interpretation of the *Durst* case, and of the statute there involved, then the full effect of the decision would be that where a franchise tax is based on the income *of* the year *for* which the tax is imposed, it accrues on the last day of such year. In such a view of the case, it is clear that the Court does not even purport to consider what would be the proper accrual date when the tax is *for* a different period than the income year, and when, as here, the taxing statute expressly designates the last day of the income year as the date when liability for the tax shall accrue and the lien in support thereof shall attach.

It is not disclosed by the Opinion in the *Durst* case whether the New York statute there in question contained any express provision designating the accrual and lien date. All that is said is that “Since computation of the franchise tax was fixed by the income of fiscal 1944, and the obligation to pay was thereupon inescapable, we think the tax was accruable on the last minute of that day.” There is no indication as to the basis for this statement, *i. e.*, whether it is based on certain express provisions of the statute or on a mere interpretation of the effect of its provisions in the aggregate. The Tax Court herein, however, stated that a *lien* is provided for in the tax statute involved in the *Durst* case and that this lien attached in a taxable year subsequent to that on the income of which the tax was based. [9 T. C. 134, R. 58.] As noted, this does not appear anywhere in the opinion in the cited case.

Accepting as true, however, the statement that the New York statute provided for a lien attaching in a *subsequent* period, would not make the cited case an authority in support of the proposition that the Tax Court is free to disregard the lien date in any and all franchise tax cases, in favor of the rule that the tax must *always* be accrued in the year *for* which it is imposed. The *Durst* case is clearly both supportable, and yet distinguishable from the case at bar, upon the basis of the following reasoning.

A lien is merely one of the indicia of "liability." It is just as proper to disregard the *lien* date specified in the statute in favor of an *earlier* accrual date (see *S. E. Bernheimer, supra*), as it is to disregard any other indicia of liability (as, for example, the date when the tax is due and payable, as in the *Anderson* case), in favor of an earlier date, *if* such *earlier* date is supported, expressly or by necessary implication, by other provisions of the taxing statute. (*S. E. Bernheimer, supra; United States v. Anderson, supra.*) For, as heretofore stated, it is clear that there may be *liability without there being a lien*. But since there can *not* be a *lien* without there being a *liability* in support of which the lien is granted, it can never be proper to disregard the lien date specified in the statute in favor of a *later* accrual date. Clearly, there could not be any valid *express* provision for a liability to arise only at a time *subsequent* to the time when the lien attaches. And it does not lie within the power of the Tax Court to read into the controlling local law a provision which would be invalid if expressly made a part of the statute.

Regardless of how the *Durst* decision is analyzed, it is clear that it does not, either on its face or on the basis of any assumptions that can reasonably be indulged in to

supplement the Opinion therein, require or support the decision herein.

Thus, the cited cases either involve taxes for which no statutory accrual or lien date was prescribed, or if there was a lien date, the decision is consistent with the principle that the statutory accrual or lien date is controlling, whichever is earlier. No authority has been found for the proposition that taxes which, under unequivocal provisions of the local tax law, accrue and become a lien in one taxable year of the taxpayer, may be shifted by the Commissioner to a later taxable year merely because that is the year *for* which the tax is imposed. Certainly, no case cited in the Opinion of the Tax Court so holds; and that Court apparently recognized this, for as noted, its whole discussion is based upon the false premise that the accrual and lien provisions of the California Franchise Tax Act may be disregarded as having “no significance” except for purposes of establishing the state’s “priority.”

E. A Disregard of the Statutory Accrual and Lien Date Is Not Required by the Principle That Deductions Must “Properly Reflect” Petitioner’s Net Income.

It is interesting to note that it is only in connection with the discussion of the proper time for taking the deduction for the franchise tax *as a business expense*, that any reference is made in the Opinion of the Tax Court to the proper accrual date as being affected by the requirement that the accrual “properly reflect” petitioner’s net income. It is merely declared, without consideration of any authorities, that the tax was “* * * an expense which must necessarily be taken into account in the tax year 1944 in order properly to reflect petitioner’s net income in that year.” [9 T. C. 133; R. 56.] This is clearly erroneous.

The case of *Security Flour Mills v. Commissioner* (1944), 341 U. S. 381, 64 S. Ct. 596, 88 L. Ed. 725, establishes beyond controversy that the Commissioner may *not* take deductions out of the year in which they in fact *legally accrued* and put them in some other year, upon the alleged ground that this is necessary in order “to clearly reflect income.” It is noteworthy that the Opinion of the Tax Court herein does not even refer to the *Security Flour Mills* case, even though that case was called to the attention of the Tax Court by the petitioner herein.

On this matter of properly reflecting income, the decision in the *Crown-Zellerbach* case, *supra*, is also of interest. In that case, in rejecting the contention of the taxpayer that these taxes should be accrued only in the proportion that they were *for* a tax period included in the taxpayer’s fiscal year, and in holding that the taxes there involved accrued—and were deductible—*when they became a lien*, the Board necessarily held that the method of accounting so approved by it *clearly reflected income*.

In the present case, under the unequivocal provisions of the state law, the tax accrued and became a lien on December 31, 1943. Under the principle established in the *Security Flour Mills* case, the Commissioner is not, under such facts, entitled to shift the accrual date to some undesignated time in 1944, under the guise of properly reflecting petitioner’s net income. Again, it is clear that the Tax Court has erred by reason of its complete disregard of the provisions of the local tax statute specifically establishing the date of accrual of, and of the lien for, the tax.

Conclusion.

In conclusion, then, it is clear that all of the decisions or rulings bearing upon the issue of the proper time for the accrual of taxes, recognize that the basic question the answer to which controls the decision is, When did "liability" for the tax arise? Clearly, the answer to that question in the present case is that liability arose on the last day of the "income year," in accordance with the express and unequivocal provisions of the Franchise Tax Act that liability for the tax shall accrue and a lien in support thereof shall attach to the real property of the taxpayer on that date. Any other answer would not give full effect to the controlling local law.

The petition for review should therefore be granted, and the decision of the Tax Court reversed and the case remanded to the Tax Court with instructions to enter judgment for the petitioner consistent with Section 322 (d) of the Internal Revenue Code.

Respectfully submitted,

JOSEPH D. BRADY,

JOHN O. PAULSTON,

Counsel for Petitioner.

Los Angeles, California, February 2, 1948.

APPENDIX.

Statutes, Regulations and Rulings Involved.

Internal Revenue Code:

Section 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes Generally.*—

(1) *Allowance in General.*—Taxes paid or accrued within the taxable year, * * *

Section 41. General Rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

Section 43. Period for which Deductions and Credits Taken.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

Section 48. Definitions.

When used in this chapter—

* * * * *

(c) “Paid or Incurred,” “Paid or Accrued.”—The terms “paid or incurred” and “paid or accrued” shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

Regulations 111:

Sec. 29.23(c)-1. Taxes.—(a) *In general.*—Subject to the exceptions stated in this section and sections 29.23(c)-2 and 29.23(c)-3, taxes imposed by the United States, any state or territory, or political subdivision of either, possessions of the United States, or foreign countries, are deductible from gross income for the year in which paid or accrued (see section 43). * * *

Sec. 29.41-1. Computation of net income.— * * * The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer’s income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 29.42-1 to 29.42-3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

Sec. 29.41-2. Bases of computation and changes in accounting methods.—Approved standard methods of ac-

counting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48 for definitions of “paid or accrued” and “paid or incurred.” All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. * * *

Sec. 29.41-3. Methods of accounting.—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. * * *

Sec. 29.43-1. “Paid or incurred” and “paid or accrued.”—(a) The terms “paid or incurred” and “paid or accrued” will be construed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. (See section 48(c).) The deductions and credits provided for in chapter 1 (other than the dividends paid credit provided in section 27) must be taken for the taxable year in which “paid or accrued” or “paid or incurred,” unless in order clearly to reflect the income such deductions or credits should be taken as of a different period. * * *

Section 29.43-2. When charges deductible.—Each year’s return, so far as practicable, both as to gross income and deductions therefrom, should be complete in itself, and taxpayers are expected to make every reasonable effort to ascertain the facts necessary to make a correct return. The expenses, liabilities, or deficit of one year

cannot be used to reduce the income of a subsequent year. A taxpayer has the right to deduct all authorized allowances, and it follows that if he does not within any year deduct certain of his expenses, losses, interest, taxes, or other charges, he cannot deduct them from the income of the next or any succeeding year. * * *

California Bank and Corporation Tax Act (Calif. Stats. 1929, p. 19) as amended to and in effect on December 31, 1943:

Sec. 4. Tax on Corporations. * * *

* * * * *

(3) *Tax on Other Corporations.* With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually to the State, for the said privilege, a minimum tax of twenty-five dollars (\$25).

* * * * *

(5) *Minimum Tax.* Every corporation not otherwise taxed in pursuance of this section and not expressly exempted by the provisions of this act or the Constitution of this State shall pay annually to the State a tax of twenty-five dollars (\$25).

* * * * *

(7) *Accrual Date.* Taxes under this section and under Sections 1 and 2 of this act shall accrue on the last day of the “income year,” as defined in Section 11 hereof.

Tax in Lieu of Other Taxes on General Franchises. Assessment of Special Franchises. Taxes under this section shall be in lieu of all ad valorem taxes and assessments of every kind and nature upon the general corporate franchises of the corporations taxable hereunder but shall not be in lieu of any taxes or assessments upon special franchises owned, held or used by said corporations. * * *

Sec. 5. Definitions. The term “corporation,” as herein used, shall include every corporation, other than a bank or banking association, and other than those expressly exempted from the tax by the provisions of this act or the Constitution of the State of California.

* * * * *

The term “doing business,” as herein used, means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.

Sec. 11. Definitions. (a) The term “income year,” as herein used, means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed herein. “Income year” includes, in the case of a return made for a fractional part of a year, the period for which such return is made.

(b) The term “taxable year,” as herein used, means the calendar year, or the fiscal year ending during such calendar year, for which the tax is payable. A “taxable year” may constitute a period of 12 months or of less duration.

* * * * *

Sec. 13. Returns of Taxpayers. Computation of Tax in Case of Commencing Banks and Corporations, Dissolutions, Withdrawals, Cessation of Business and Corporate Reorganizations. (a) *Returns of Taxpayers.* Every bank and corporation subject to the tax imposed by this act shall, within two months and 15 days after the close of its income year, transmit to the commissioner a return in a form prescribed by him, specifying, for the income year, all such facts as he may by rule, or otherwise, require in order to carry out the provisions of this act. Any return filed under the provisions of the Corporation Income Tax Act, which discloses the net income for any period, shall likewise constitute a return filed for the same period under this act, if the corporation should have filed a return under this act.

In the event that taxes, interest and penalties have been or shall be assessed against, paid by or collected from a corporation under this act, which assessment, payment or collection should have been made under the Corporation Income Tax Act, such taxes, interest and penalties shall be considered as having been assessed, paid or collected under the Corporation Income Tax Act as of the date or dates they were made.

(b) *Commencing Corporation to Prepay Minimum Tax.* A corporation which incorporates or organizes under the laws of this State or qualifies to do business in this State, after the effective date of this act, shall thereupon prepay the minimum tax hereunder, which prepayment must be made before the corporation files with the Secretary of State its articles of incorporation or duly certified copy thereof as the case may be.

(c) *Computation of Tax of Commencing Corporations.*

If a bank or a corporation commences to do business in this State during its first taxable year its tax for that year shall be adjusted upon the basis of the net income received during that taxable year, at the rate applicable to that year, a credit being allowed for the prepayment of the minimum tax. The return for the first taxable year, which shall be filed within two months and 15 days after the close of that year, shall also, in accordance with Sections 23 to 26, inclusive, be the basis for the tax of said bank or corporation for its second taxable year, if its first taxable year is a period of 12 months. In every case in which the first taxable year of a bank or corporation constitutes a period of less than 12 months, or in which a bank or corporation does business for a period of less than 12 months during its first taxable year, said bank or corporation shall pay as a prepayment of the tax for its second taxable year a tax based on the income for the first taxable year computed under the law and at the rate applicable to the second taxable year, the same to be due and payable at the same times and in the same manner as if that amount were the entire amount of its tax for that year; and upon the filing of its tax return within two months and 15 days after the close of the second taxable year it shall pay a tax for said year, at the rate applicable to that year, based upon its net income received during that year, allowing a credit for the prepayment; but in no event shall the tax for the second taxable year be less than the amount of the prepayment for that year, and said return for its second taxable year shall also, in accordance with Sections 23 to 26, inclusive, be the basis for the tax of said bank or corporation for its third taxable year.

(d) *Computation of Tax of Corporation Commencing to Do Business for First Time in Taxable Year Other Than Year of Incorporation.* When any bank or corporation commences to do business in this State for the first time in any taxable year other than the year of incorporation or qualification, its tax for that taxable year and for the succeeding taxable year shall be computed in accordance with the provisions of subdivision (c) of this section relative to first and second taxable years, a credit being allowed for any tax payable under subdivision (5) of Section 4 hereof, for the year in which it commences to do business.

(e) *Due Date of Adjusted Tax.* The adjusted tax, as provided in subdivisions (c) and (d) of this section, for any taxable year in excess of the prepayment for that year, shall be due and payable in one amount on or before the fifteenth day of the third month following the close of that taxable year, or on or before the expiration of the period of extension where an extension has been granted by the commissioner under the provisions of Section 15 of this act, and, if not so paid, interest shall be added thereto in the manner and at the rate or rates provided in Section 24 of this act.

(f) *Apportionment of Income or Deductions Reported on Deferred Basis.* In the case of a bank or corporation taxable in the manner provided in subdivisions (c) and (d) of this section, reporting income from any source on a deferred basis, the commissioner is authorized to distribute or apportion such income, or deductions applicable thereto, if he determines that such distribution or apportionment is necessary in order to prevent avoidance of taxes or clearly to reflect the income of such bank or corporation.

(g) *Provisions for Tax of Commencing Corporations Not Applicable to Reorganized Corporations.* Subsections (c), (d), and (e) of this section shall not apply to a bank or a corporation which commences to do business in this State, pursuant to a reorganization of a bank or corporation as defined in subsection (j) of this section.

(h) *Tax Imposed on Transferee in Reorganization.*

(1) Where, pursuant to a reorganization, all or a substantial portion of the business or property of a bank or corporation, a party to the reorganization is transferred to another bank or corporation, a party to the reorganization: (A) The net income of the transferor from the business or property so transferred to any bank or corporation for the taxable year in which the transfer occurs, shall be included in the measure of the tax on the transferee for the taxable year succeeding the taxable year in which the transfer occurs if the taxable year of the transferee in which the transfer occurs ends at the same time as or before the time the taxable year of the transferor in which the transfer occurs ends. Income of the transferor so included in the measure of the tax on the transferee shall be considered the income of the transferee for the purposes of this act.

(B) If the taxable year of the transferee in which the transfer occurs ends after the taxable year of the transferor in which the transfer occurs ends, the transferee shall, within two months and 15 days after the close of the taxable year of the transferor in which the transfer occurs, file a return disclosing the net income of the transferor from the business or property transferred for the taxable year in which the transfer occurs, and pay a tax measured by such income.

(2) If, at the time of any of the transfers referred to in the preceding subdivision (1), the transferor has not become subject to a tax measured by its income for the taxable year preceding the taxable year in which the transfer occurs, the transferee shall within two months and 15 days after the close of the month in which the transfer occurs file a return disclosing the net income of the transferor for such preceding year and pay a tax measured by such income.

(3) Whenever under this subsection the transferee is required to pay a tax measured by the income of the transferor, the rate of tax applicable to the transferee shall apply.

(4) The transferee shall, pursuant to the provisions of Sections 4 and 26 of this act, be entitled to the same offset against any tax imposed on it measured by the income of the transferor for taxes on the business or property transferred as would have been allowed the transferor had the reorganization not occurred.

(i) *Transferor's Income to Be Included in Only One Tax.* Where income of the transferor is required to be included in the computation of a tax on the transferee, such income shall not thereafter be included in the measure of a tax on the transferor.

(j) *"Reorganization" Defined.* The term "reorganization" as used in this section means (1) a transfer by a bank or corporation of all or a substantial portion of its business or property to another bank or corporation if immediately after the transfer the transferror or its stockholders or both are in control of the bank or corporation to which the assets are transferred; or (2) a mere change in identity, form or place of organization however ef-

fect; or (3) a merger or consolidation; or (4) a distribution in liquidation by a bank or corporation of all or a substantial portion of its business or property to a bank or corporation stockholder. As used in this paragraph the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the bank or corporation.

(k) *Tax of Corporations Undergoing Dissolution or Withdrawal.* Any bank or corporation which is dissolved and any foreign corporation which withdraws from the State during any taxable year shall pay a tax hereunder only for the months of such taxable year which precede the effective date of such dissolution or withdrawal, according to or measured by such proportionate part of the net income of the preceding income year as the number of months of the taxable year prior to the effective date of such dissolution or withdrawal bears to the entire preceding income year; provided, however, that in the case of any bank or corporation which is dissolved, or which withdraws from the State during any taxable year, the offset from the tax for the months of such taxable year prior to the effective date of such dissolution or withdrawal shall not exceed that proportion of the offset computed under Section 26 which the number of said months prior to the effective date of such dissolution or withdrawal bears to the number of months of the preceding income year; and provided further, that the taxes levied under this act shall not be subject to abatement or refund because of the cessation of business or corporate existence of any bank or corporation pursuant to a reorganization, consolidation, or merger. In any event, each such corporation shall pay a tax not subject to offset for such period in an

amount equal to the minimum tax provided for in Section 4 of this act.

(1) *Tax of Corporations Resuming Business.* When a corporation discontinues doing business within the State during any taxable year and does not dissolve or withdraw from the State during that year, and does not resume doing business during the succeeding taxable year, its tax for the year in which it resumes doing business shall be computed upon the basis of the net income for the year in which it discontinued doing business (except where such income has already been included in the measure of a tax imposed by this Act), a credit being allowed for any tax payable under subdivision (5) of Section 4 of this act. One-half the amount of such tax shall be due and payable at the time the corporation resumes doing business, or on or before the fifteenth day of the third month following the close of its income year, whichever is later, and the balance shall be due and payable within six months of the time the corporation resumes doing business, or on or before the fifteenth day of the ninth month following the close of the income year, whichever is later, but, in no event shall the balance of the tax be due and payable later than the close of the taxable year in which it resumes doing business. All the provisions of this act relating to delinquent taxes shall be applicable to such tax if it is not paid on or before its due date.

(m) *Tax of Suspended Corporation on Revival.* The tax of any bank or corporation which has suffered the suspension or forfeiture provided in Section 32 of this act, and which revives in any taxable year other than the taxable year in which suspension or forfeiture occurred, but did not transact business, as defined in Section 5 of this act, during the period of such suspension or forfeit-

ure, shall be computed in the same manner as provided in subdivisions (c) and (d) of this section relative to the computation of taxes of banks and corporations commencing to do business for the first time after incorporation or qualification. Such a bank or corporation shall, in addition to the taxes, penalties, and interest specified in Section 33 of this act, prepay a tax in an amount equal to the minimum tax provided for in Section 4 of this act as a condition precedent to the issuance of a certificate of revivor.

(n) *Tax Not a Deficiency Assessment.* Any tax, imposed pursuant to this section, based on the net income as disclosed by the return, shall not be considered a deficiency assessment within the meaning of Section 25 of this act.

(o) *Tax Liability for Short Taxable Years.* The tax liability imposed under this act shall attach whether a bank or corporation has a taxable year of 12 months or of less duration.

Sec. 22. Franchise Tax Commissioner. The Franchise Tax Commissioner, herein referred to, shall be appointed by the Director of the Department of Finance, the Controller of the State and the Chairman of the State Board of Equalization, who are authorized to provide him with such assistants as they may deem necessary, and he shall serve for such period, and for such compensation, and under such conditions, as they may prescribe.

He shall have power and it shall be his duty to administer this act, and to prescribe all such rules and regulations as are necessary and reasonable to carry out its provisions; and said commissioner and the State Board of Equalization, for the purpose of administering their duties under this act, each shall have the powers conferred upon said board by section 3669e of the Political Code of this State.

Sec. 23. Time Taxes Payable and Delinquent. * * *

* * * * *

Corporations. In the case of corporations of the classes referred to in subdivision (3) of section 4 of this act, one-half the amount of tax disclosed by the return shall be due and payable as a first installment of the tax on such corporations on or before the fifteenth day of the third month following the close of the income year, as defined in section 11 hereof. The balance of the tax shall be due and payable as a second installment on or before the fifteenth day of the ninth month following the close of the income year. A tax imposed by this act or any installment thereof may be paid at the election of the taxpayer, prior to the date prescribed for its payment.

* * * * *

Sec. 29. Lien of Tax—Commissioner's Certificate.

(a) The taxes imposed by this act and disclosed on the return shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien and shall attach on the last day of the "income year," except that in the case of a bank or corporation incorporated under the laws of this State or a foreign bank or corporation qualified to do business within the limits of this State, after the effective date of this amendment, the lien of taxes for the first taxable year of such a bank or corporation shall attach at the time of such incorporation or qualification. The taxes imposed by this act and determined pursuant to Sections 16, 25 or 28 shall constitute a lien upon all real property of the taxpayer located in any county in which there is filed for record in the office of the county recorder a certificate executed by the commissioner stating that payment of a tax determined under the provisions of Sections 16,

25 or 28 of this act has been demanded and has not been paid and specifying the amount thereof and the name of the taxpayer, and such lien shall attach at the time the certificate is recorded and shall have the same force, effect and priority as a judgment lien. The lien provided for in this section shall remain until the taxes are paid or the property subject to the lien is sold for the payment thereof, or until the lien is released or otherwise extinguished. The commissioner may at any time release all or any portion of the property subject to the lien from the lien or subordinate the lien to other liens if he determines that the taxes are sufficiently secured by a lien on other property of the taxpayer or that the release or subordination of the lien will not endanger or jeopardize the collection of such taxes. A certificate by the commissioner to the effect that any property has been released from the lien herein provided for or that such lien has been subordinated to other liens shall be conclusive evidence that the property has been released or that the lien has been subordinated as provided in the certificate.

(b) No decree of dissolution shall be made and entered by any court, nor shall the county clerk of any county or the Secretary of State file any such decree, or file any other document by which the term of existence of any taxpayer shall be reduced or terminated, nor shall the Secretary of State file any certificate of the surrender by a foreign corporation of its right to do intrastate business in this State unless the taxpayer obtains from the commissioner and files with said court, county clerk or Secretary of State as the case may be, a certificate to the effect the commissioner is satisfied from the available evidence that all taxes imposed by this act have been paid or are secured by bond, deposit or otherwise. Within 30 days after receiving a request for a certificate, the commis-

sioner shall either issue the certificate or notify the person requesting the certificate of the amount of tax that must be paid or the amount of bond, deposit or other security that must be furnished as a condition of issuing the certificate. The issuance of the certificate shall not relieve the taxpayer or any individual, bank, or corporation from liability for any taxes, penalties, or interest imposed by this act.

California Corporation Tax Service:

Par. 5-951.02. Application.—It is our opinion that the amendment by Ch. 352, Laws 1943, to Sec. 4(7) is not an amendment “effecting changes in the computation of taxes” and therefore became effective on May 7, 1943. It follows that the amendment is applicable to all taxes accruing after such date and the tax under the Act now accrues on the last day of the income year in question. We have, therefore, concluded that the amendment is applicable to any income year ending after the effective date of Ch. 352. *Letter of the Acting Franchise Tax Commissioner to Commerce Clearing House, Inc., November 17, 1943.*

Par. 5-313. Art. 13(m)-1. Dissolving or Withdrawing Corporations—Months Prior to Dissolution or Withdrawal.—Section 13(m) (k) of the Act provides that any bank or corporation which is dissolved and any foreign corporation which withdraws from the State during any taxable year shall pay a tax only for the months of such taxable year which precede the effective date of such dissolution or withdrawal, according to or measured by such proportionate part of the net income of the preceding income year as the number of months of the taxable year prior to the effective date of such dissolution or withdrawal bears to the entire preceding income year.

In the application of this provision, the month in which a corporation dissolves or withdraws shall be considered as a full month prior to dissolution or withdrawal, if dissolution or withdrawal occurs after the middle of such month. If dissolution or withdrawal occurs on or before the middle of the month, the month in which the dissolution or withdrawal occurs shall be disregarded. For example, suppose a corporation reporting on a calendar year basis dissolves or withdraws on June sixteenth of a particular year. The tax for the year in which the dissolution or withdrawal occurs will be based on one-half of the income for the preceding year, i. e., on that portion of the income for the preceding year which six months, the number of months preceding dissolution, considering June as a full month bears to the number of months in the preceding year. If the corporation had dissolved or withdrawn during June, but prior to June sixteenth, the month of June would be disregarded. Thus, the tax for the year of dissolution or withdrawal would be based on five-twelfths of the income for the preceding year.

Par. 5-911.04. Foreign corporation's right to do intra-state business.—The annual \$25.00 minimum tax may be legally imposed upon foreign corporations qualified to do business in the State, regardless of whether or not that privilege is exercised. The minimum tax is imposed for the right, and not for the exercise of that right. *Opinion of the Attorney General to the Franchise Tax Commissioner*, No. NS 4439, December 1, 1942.

Par. 5-312a. Art. FT 13(k)-No. 1. Effective Date of Dissolution Under Section 13(k).—A taxpayer will be deemed to be dissolved, for purposes of Section 13(k)(1), when it has filed the certificate required by Section 403(c) of the Civil Code.

This regulation shall be applicable to all taxable years commencing after December 31, 1938. For prior taxable years, such dissolution will be deemed to have occurred when the taxpayer distributed all of its assets after the stockholders voted for or consented to such distribution pursuant to Section 400 of the Civil Code.

Authority for this regulation is contained in the following sections of the Bank and Corporation Franchise Tax Act: 13(k)(1), 22, 22.1 and 29. (*As issued December 27, 1945.*)

Par. 8-053. Art. 29-1. Dissolution or Withdrawal of Corporations.—Section 29 provides that no decree of dissolution shall be made and entered by any court, nor shall the county clerk of any county or the Secretary of State file any such decree, or file any other document by which the term of existence of any taxpayer shall be reduced or terminated, nor shall the Secretary of State file any certificate of the surrender by a foreign corporation of its right to do intrastate business in this State until the tax, penalties, and interest shall have been paid.

To facilitate the dissolution and withdrawal of banks and corporations, the Commissioner will issue a certificate to the effect that all taxes, penalties and interest imposed by the Act upon a bank or corporation desiring to dissolve or withdraw have been paid provided the following requirements are met:

1. All returns required under the Act must be filed, and all taxes, penalties and interest for taxable years prior to the year in which dissolution or withdrawal is to occur must be paid.
2. Except in the case of banks, a tax of at least \$25 for the taxable year in which dissolution or withdrawal

is to occur, plus any penalties or interest that may have accrued in connection therewith, must be paid. If the bank or corporation has not engaged in any business activities in this State since the beginning of the year in which dissolution or withdrawal is to occur, and does not intend to engage in any such activities prior to dissolution or withdrawal, and if an affidavit to the foregoing effect signed under oath by one of the officers or other duly authorized representative of the bank or corporation is filed, no further taxes need be paid.

3. If the bank or corporation has engaged in business activities in this State since the beginning of the taxable year in which dissolution or withdrawal is to occur or intends to engage in such activities prior to dissolution or withdrawal and if the bank or corporation is not dissolving or withdrawing pursuant to a reorganization, there must be paid for the taxable year in which dissolution or withdrawal is to occur, a tax, computed at the rate provided in the Act, based on that proportion of the net income for the preceding fiscal or calendar year, which the number of months of the year prior to the date on which it is contemplated that dissolution or withdrawal will be effected, bears to the number of months in the preceding fiscal or calendar year. The number of months prior to dissolution or withdrawal shall be determined in accordance with the regulation to Sec. 13(m) issued under date of July 12, 1937.

4. If the bank or corporation is dissolving or withdrawing pursuant to a reorganization, merger or consolidation, there must be paid for the year of dissolution or withdrawal, a tax at the rate provided in the Act based on the entire net income for the preceding fiscal or calendar year. Requests for certificates should state whether

or not the dissolution or withdrawal of the bank or corporation in question is being undertaken pursuant to a reorganization, merger or consolidation.

Any certificate issued pursuant to this regulation will be issued on the assumption that dissolution or withdrawal of the bank or corporation will be effected on or before a specified date. The taxes required to be paid under (3) above will be computed accordingly. Generally, the date specified in the certificate will be the fifteenth of the month following the month in which the certificate is issued, although in special cases a longer or shorter period may be allowed. If, for any reason, dissolution or withdrawal is not effected on or before the date specified, the certificate shall be void, and a new certificate must be obtained. (*Adopted October 5, 1937.*)

No. 11796

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

CENTRAL INVESTMENT CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General,

SEWALL KEY,

A. F. PRESCOTT,

IRVING I. AXELRAD,

Special Assistants to the Attorney General.

FILED

MAR 15 1948

PAUL P. O'BRIEN, CLERK

INDEX

| | Page |
|---|------|
| Opinion below..... | 1 |
| Jurisdiction..... | 1 |
| Question presented..... | 2 |
| Statutes and regulations involved..... | 2 |
| Statement..... | 2 |
| Summary of argument..... | 6 |
| Argument: | |
| The California franchise tax imposed and paid for the privilege of doing business during the calendar year 1944 was not an accruable deduction for federal income tax purposes for the calendar year 1943..... | 8 |
| A. The 1944 California franchise tax was not an accrued deduction in 1943 because it was neither (1) imposed for, and therefore not a cost of business in 1943, nor (2) did all, or even any, of the events creating liability for the tax occur in 1943..... | 11 |
| 1. The accrual doctrine in the Supreme Court and the Circuit Courts of Appeals..... | 11 |
| 2. The Tax Court decisions do not support the taxpayer..... | 22 |
| 3. The decision below gives effect to the Commissioner's consistent administrative practice..... | 26 |
| 4. The property tax cases..... | 29 |
| B. The time fixed in the California Franchise Act for the accrual of the tax and the attaching of the lien, both as of the last day of the income year, is not controlling for federal tax purposes..... | 31 |
| C. The scope of the Court's review of this issue is restricted by the "Dobson" principle..... | 34 |
| Conclusion..... | 36 |
| Appendix..... | 37 |

CITATIONS

Cases:

| | |
|---|--------|
| <i>Allen v. Atlanta Stove Works</i> , 138 F. 2d 452..... | 12, 29 |
| <i>Aluminum Castings Co. v. Routzahn</i> , 282 U. S. 92..... | 12 |
| <i>American National Co. v. United States</i> , 274 U. S. 99..... | 12 |
| <i>Art Metal Const. Co. v. United States</i> , 17 F. Supp. 854..... | 12 |
| <i>Atlantic Coast Line Railroad Co. v. Commissioner</i> , 4 T. C. 140..... | 25 |
| <i>Bernheimer, S. E. & M. E., Co. v. Commissioner</i> , 41 B. T. A. 249, affirmed, 121 F. 2d 454..... | 30 |
| <i>Brown, H. H., Co. v. Commissioner</i> , 8 B. T. A. 112..... | 25 |

Cases—Continued

| | Page |
|---|--------|
| <i>Brown v. Helvering</i> , 291 U. S. 193..... | 12, 27 |
| <i>Burnet v. Aluminum Goods Co.</i> , 287 U. S. 544..... | 10 |
| <i>Burnet v. Harmel</i> , 287 U. S. 103..... | 32 |
| <i>California Sanitary Co. v. Commissioner</i> , 32 B. T. A. 122..... | 29 |
| <i>Case, J. I., Co. v. United States</i> , 65 F. Supp. 464..... | 27 |
| <i>Citizens Hotel Co. v. Commissioner</i> , 127 F. 2d 229..... | 12, 30 |
| <i>Colton, George S., Elastic Web Co. v. United States</i> , 116 F. 2d 202.. | 12, 25 |
| <i>Commissioner v. Le Roy</i> , 152 F. 2d 936..... | 33 |
| <i>Commissioner v. Ranier Brewing Co.</i> , decided January 8, 1948, rehearing denied, February 18, 1948..... | 35 |
| <i>Commissioner v. Schock, Gusmer & Co.</i> , 137 F. 2d 750..... | 12, 29 |
| <i>Commissioner v. Union Pac. R. Co.</i> , 86 F. 2d 637..... | 27 |
| <i>Crown Zellerbach Corp. v. Commissioner</i> , 43 B. T. A. 541..... | 29 |
| <i>Dixie Pine Co. v. Commissioner</i> , 320 U. S. 516..... | 12 |
| <i>Dobson v. Commissioner</i> , 320 U. S. 489..... | 34 |
| <i>Dodge v. Nevada Nat. Bank</i> , 109 Fed. 726..... | 20 |
| <i>Durst Productions Corp. v. Commissioner</i> , 8 T. C. 1326..... | 23 |
| <i>East Bay Municipal U. Dist. v. Garrison</i> , 191 Cal. 680..... | 20 |
| <i>Educational Films Corp. v. Ward</i> , 282 U. S. 379..... | 16 |
| <i>Fawcus Machine Co. v. United States</i> , 282 U. S. 375..... | 12 |
| <i>Grace Bros., Inc. v. Commissioner</i> , 10 T. C. No. 21..... | 22 |
| <i>Helvering v. Midland Ins. Co.</i> , 300 U. S. 216..... | 27 |
| <i>Helvering v. Ohio Leather Co.</i> , 317 U. S. 102..... | 34 |
| <i>Ilfeld Co. v. Hernandez</i> , 292 U. S. 62..... | 10 |
| <i>Interstate Transit Lines v. Commissioner</i> , 319 U. S. 590..... | 34 |
| <i>Keller-Dorian Corp. v. Commissioner</i> , 153 F. 2d 1006..... | 12 |
| <i>Knox-Powell-Stockton Co., In re</i> , 100 F. 2d 979..... | 20 |
| <i>Levi-Strauss Realty Co. v. United States</i> , 41 F. 2d 55..... | 10 |
| <i>Lichtenberger-Ferguson Co. v. Welch</i> , 54 F. 2d 570..... | 12 |
| <i>Liebes, H., & Co. v. Commissioner</i> , 90 F. 2d 932..... | 12 |
| <i>London-Butte Gold M. Co. v. Commissioner</i> , 116 F. 2d 478..... | 12 |
| <i>Lucas v. American Code Co.</i> , 280 U. S. 445..... | 12 |
| <i>Lyeth v. Hoey</i> , 305 U. S. 188..... | 32 |
| <i>Magruder v. Supplee</i> , 316 U. S. 394..... | 29 |
| <i>New Colonial Co. v. Helvering</i> , 292 U. S. 435..... | 34 |
| <i>New York v. Maclay</i> , 288 U. S. 290..... | 21 |
| <i>Niles Bement Pond Co. v. United States</i> , 281 U. S. 357..... | 12 |
| <i>Pacific Co. v. Johnson</i> , 285 U. S. 480..... | 16 |
| <i>Palmer v. Bender</i> , 287 U. S. 551..... | 32 |
| <i>Petaluma & Santa Rosa R. R. Co. v. Commissioner</i> , 11 B. T. A. 541..... | 23 |
| <i>Putnam, Estate of v. Commissioner</i> , 324 U. S. 393..... | 32 |
| <i>Seattle Brewing & Malting Co. v. Commissioner</i> , decided January 8, 1948, rehearing denied, February 18, 1948..... | 35 |
| <i>Schuster, Ed., & Co. v. Williams</i> , 283 Fed. 115..... | 12 |
| <i>Security Mills Co. v. Commissioner</i> , 321 U. S. 281..... | 11 |
| <i>Sitterding v. Commissioner</i> , 80 F. 2d 939..... | 27 |
| <i>Spokane Dry Goods Co. v. Commissioner</i> , 125 F. 2d 865..... | 10 |

III

Cases—Continued

| | Page |
|---|--------|
| <i>Triplex Safety Glass Co. of North America v. Latchum</i> , 131 F. 2d 1023----- | 12 |
| <i>United States v. American Can Co.</i> , 280 U. S. 412----- | 27 |
| <i>United States v. Anderson</i> , 269 U. S. 422----- | 11 |
| <i>United States v. Pelzer</i> , 312 U. S. 399----- | 32 |
| <i>United States v. Sampsell</i> , 153 F. 2d 731----- | 21 |
| <i>United States v. Texas</i> , 314 U. S. 480----- | 21 |
| <i>Van Norman Co. v. Welch</i> , 141 F. 2d 99----- | 12, 25 |
| <i>White v. United States</i> , 305 U. S. 281----- | 34 |

Statutes:

| | |
|--|------|
| California Bank and Corporation Franchise Tax Act (3 Deering, California General Laws, 1945 Pocket Supp., Act 8488)----- | 3, 9 |
| Sec. 4----- | 3, 9 |
| Sec. 11----- | 3, 9 |
| Sec. 13----- | 4, 9 |
| Sec. 23----- | 9 |
| Sec. 29----- | 3, 9 |
| Internal Revenue Code: | |
| Sec. 23 (26 U. S. C. 1940 ed., Sec. 23)----- | 37 |
| Sec. 41 (26 U. S. C. 1940 ed., Sec. 41)----- | 37 |
| Sec. 43 (26 U. S. C. 1940 ed., Sec. 43)----- | 38 |
| Sec. 48 (26 U. S. C. 1940 ed., Sec. 48)----- | 38 |
| Revised Statutes, Sec. 3186----- | 15 |

Miscellaneous:

| | |
|--|----|
| Edelman, Time for Accrual & Deduction of Taxes, 23 Taxes, Tax Magazine 110 (1945)----- | 12 |
| Ellis, Deductions for Accrued Taxes, 14 Taxes, Tax Magazine 197 (1936)----- | 26 |
| G. C. M. 22525, 1941-1 Cum. Bull. 350----- | 26 |
| H. Rep. No. 179, 68th Cong., 1st Sess., pp. 10-11 (1939-1 Cum. Bull. (Part 2) 241, 249)----- | 19 |
| I. T. 2770, XIII-1, Cum. Bull. 111 (1934)----- | 26 |
| I. T. 2935, XIV-2 Cum. Bull. 91 (1936)----- | 26 |
| I. T. 2971, XV-1 Cum. Bull. 107 (1936)----- | 26 |
| I. T. 2988, XV-2 Cum. Bull. 179 (1936)----- | 26 |
| I. T. 3047, 1937-1 Cum. Bull. 66----- | 26 |
| I. T. 3136, 1937-2 Cum. Bull. 100----- | 26 |
| I. T. 3150, 1938-1 Cum. Bull. 125----- | 26 |
| I. T. 3151, 1938-1 Cum. Bull. 126----- | 26 |
| I. T. 3186, 1938-1 Cum. Bull. 140----- | 26 |
| I. T. 3189, 1938-1 Cum. Bull. 141----- | 26 |
| I. T. 3192, 1938-1 Cum. Bull. 144----- | 26 |
| I. T. 3232, 1938-2 Cum. Bull. 70----- | 26 |
| I. T. 3646, 1944-1 Cum. Bull. 104----- | 26 |
| I. T. 3887, 1948-2 Cum. Bull. 4----- | 26 |
| Mayer, The Accrual Date of the New York State Franchise Tax, 26 Taxes, Tax Magazine 43 (1948)----- | 24 |

IV

Miscellaneous—Continued

Page

S. Rep. No. 398, 68th Cong., 1st Sess., pp. 10-11 (1939-1 Cum.

Bull. (Part 2) 266, 273) ----- 19

Traynor and Keesling, Bank and Corporation Franchise Tax

Act, 23 Cal. L. Rev. 51, 73-75 ----- 20

Treasury Regulations 111:

Sec. 29.23 (c)-1 ----- 42

Sec. 29.41-1 ----- 42

Sec. 29.41-2 ----- 42

Sec. 29.41-3 ----- 43

Sec. 29.43-1 ----- 43

Sec. 29.43-2 ----- 43

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11796

CENTRAL INVESTMENT CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 46-59) are reported in 9 T. C. 128.

JURISDICTION

This petition for review (R. 75-79) involves a deficiency in federal excess profits tax for the calendar year 1943 in the amount of \$34,971.23 (R. 60). On March 21, 1945, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in tax and statement. (R. 8-13.) Within ninety days thereafter and on May 8, 1945, the taxpayer filed a petition (R. 3-8) with the Tax Court of the United States for redetermination of the deficiency in tax under the

provisions of Section 272 of the Internal Revenue Code. The decision of the Tax Court sustaining the deficiency in tax was entered on July 31, 1947. (R. 60.) The proceeding is brought to this Court by a petition for review filed October 30, 1947 (R. 75-79), pursuant to the provisions of Sections 1141-1142 of the Internal Revenue Code.

QUESTION PRESENTED

Did the Tax Court err in holding that a California franchise tax imposed and paid in 1944 for the privilege of doing business for the year 1944 but measured by income realized in 1943 is not accruable and deductible for federal tax purposes in the year 1943, under Section 23 (c) (1) of the Internal Revenue Code, in the case of a taxpayer on the calendar year and accrual basis of accounting?

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations involved are set out in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The taxpayer is a California corporation, organized October 6, 1921, with its principal offices located in Los Angeles, where it owns the Biltmore Hotel. At no time material hereto did the taxpayer have any pending negotiations for the possible sale of its Biltmore Hotel property or contemplate dissolution or liquidation. (R. 47.)

In 1929 the California Legislature enacted the Bank and Corporation Franchise Tax Act, chapter 13, Laws of 1929, hereinafter referred to as the Act. The Act, as amended in 1943 in Section 4 (3), provides that corporations doing business in California and not otherwise exempt "shall annually pay to the State, for the privilege of exercising its corporate franchises * * *, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year." (R. 47-48.)

Section 11 provides that the term "income year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed. The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, for which the tax is payable. A "taxable year" may constitute a period of 12 months or of less duration. (R. 48.)

Section 4 (7) provides that taxes under this section and under Sections 1 and 2 of this Act shall accrue on the last day of the income year as defined in Section 11. (R. 48.)

Section 29 (a) provides that the taxes imposed shall constitute a lien upon the real property of the taxpayer and shall attach on the last day of the income year. (R. 49.)

Prior to the 1943 amendment of the Act, it provided that the tax accrued and the lien therefor attached on the first day of the taxable year. (R. 49.)

Section 13 of the Act requires every corporation subject to the tax to file a return within two months and 15 days after the close of its income year. The tax is payable on or before the fifteenth day of the third month following the close of the ninth month following the close of the income year. (R. 49.)

Section 13 of the Act also deals with the computation of the franchise tax in situations where corporations are commencing business in their first taxable year or are withdrawn or dissolved within the taxable year. In the case of commencing corporations it is provided in general that the tax for the first taxable year shall be based on the income of such year and paid during the second year. With respect to corporations withdrawing or dissolving during the taxable year it is provided in general that the tax for such taxable year be reduced on account of the portion of such year during which the taxpayer does not do business in California. (R. 50.)

For the privilege of doing business within the State during the calendar year 1943, the taxpayer filed on April 26, 1943, its franchise tax return which disclosed its gross and net incomes for the calendar year 1942 and a franchise tax liability of \$19,736.60, which was paid in April and September, 1943. (R. 50.)

For the privilege of doing business within the State during the calendar year 1944, the taxpayer filed on May 5, 1944, its franchise tax return which disclosed its gross and net incomes for the calendar year 1943 and a franchise tax liability of \$43,174.36. (R. 50-51.)

The franchise tax for 1944 was imposed by Section 4 (3) of the Act and was determined "according to or measured by" the net income for the calendar year 1943 of \$1,206,923.17. The tax of \$43,174.36 was set up on the taxpayer's books of account as a liability as of December 31, 1943, before the closing of the books for the calendar year 1943. It was paid in March and September, 1944. The taxpayer has never disputed its liability for the whole or any part of the tax, has never filed any claim for refund or credit for the whole or any part thereof, and has never had, and does not now have, any intention of filing any such claim. (R. 51.)

In filing its federal income and excess profits tax returns for the calendar year 1943, the taxpayer claimed deductions not only for the California franchise tax imposed for the privilege of doing business in the State during 1943, in the amount of \$19,736.60, but also for the California franchise tax imposed for the privilege of doing business in the State during 1944, in the amount of \$43,174.36. (R. 51.)

The Commissioner disallowed the deduction of \$43,174.36 for the calendar year 1943 on the ground that the franchise tax paid for the year 1944 was properly accruable and deductible for federal income tax purposes in the calendar year 1944 under Section 23 (c) of the Internal Revenue Code. (R. 51-52.)

The Tax Court sustained that action. (R. 46.) The taxpayer petitions for review. (R. 75.)

SUMMARY OF ARGUMENT

The purpose of accrual accounting in federal income tax law is to accurately relate the expense of doing business to the income it produces in order to determine net income, the base of the tax. It is now settled beyond dispute that this consideration tested by whether all events have occurred fixing the fact and amount of liability is the standard marking the year for accrual and deduction of state taxes. The Commissioner and the Tax Court, therefore, correctly determined that the 1944 California franchise tax undisputedly imposed on the taxpayer for the privilege of doing business in 1944, and returned, assessed, and paid in 1944, was not a proper accrual for 1943.

Taxpayer seeks to deduct both the 1943 and 1944 California taxes in 1943 because of a 1943 change in the California statute providing that a lien exists and the tax accrues for 1944 taxes on December 31, 1943. But in providing a lien for a nonexistent liability the legislature may have acted contrary to the California Constitution. In any event, the enactment did not change the undisputed fact that until taxpayer did business in 1944 there was no liability for the tax. It is impossible, then, to conclude that all, or even any, of the events fixing liability occurred in 1943. And the major accrual premise that expenses creating income be related to the income they help to produce in order to accurately determine net income is completely ignored by taxpayer when it attempts to deduct the expense of 1944 business in 1943 and in addition seeks

to deduct the 1943 tax as well. The result is distortion of income for 1943 and later years as well.

Code Section 41 delegates unusual discretion to the Commissioner to determine when an accrual occurs measured by the standard of clearly reflecting income. The Commissioner has consistently related this and similar taxes to the year for which they were imposed and these rulings in view of Section 41 are entitled to more than usual weight.

Counsel's contention that the provision of California law accruing the 1944 tax in 1943 is dispositive of the accrual date for federal tax purposes directly contradicts a long line of authority that the revenue laws are to be given a uniform interpretation throughout the United States unless by their necessary implication they are made dependent on state law. Nothing in Sections 23 (c) (1) or 41 here involved requires resort to state law in the context of this controversy. Moreover, the Supreme Court has expressly held that when an item accrues is a federal, not a local, question.

Finally, although not necessary to a resolution of this issue on our analysis because the Tax Court could reach only the result it did, if the Court should think the issue susceptible of two solutions, the question is one governed by the *Dobson* principle. The issue is one of accounting referred to in the *Dobson* opinion itself as one of a type within the principle there announced. Moreover, the Court has expressly held, in a later decision, that the time for accrual of a state tax is governed by *Dobson*.

Thus, while the decision below is the only possible one on the merits in view of the controlling decisions of the courts, it is, in addition, entitled to finality on the alternative theories (1) that it approved the Commissioner's determination which is final barring abuse of discretion, and (2) that the Tax Court's decision is entitled to finality within the *Dobson* principle. Both of these approaches are aided by settled doctrine that a deduction provision is to be narrowly construed and interpreted to avoid a double deduction which in a real sense taxpayer here seeks.

ARGUMENT

The California franchise tax imposed and paid for the privilege of doing business during the calendar year 1944 was not an accruable deduction for Federal income tax purposes for the calendar year 1943

The sole question presented by this appeal is whether the Tax Court erred in sustaining the Commissioner's determination that taxpayer, which kept its books by calendar years on the accrual basis, could not accrue as a tax deduction for the year 1943, the 1944 California franchise tax expressly imposed for the privilege of doing business in 1944. The relevant provisions of the statute imposing that tax (California Bank and Corporation Franchise Tax Act) are contained in the Tax Court's findings of fact (R. 47-50), summarized in the statement, *supra*, and set forth in the Appendix, *infra*. In sum those provisions are that an annual tax is imposed on a calendar year taxpayer "for the privilege of exercising its corporate

franchises within this State," measured by its net income for the preceding calendar year;¹ a minimum tax of \$25 is imposed;² the term "income year" is defined as the calendar year upon which net income is computed³ and "taxable year" is the calendar year "for which the tax is payable;"⁴ the tax "accrues" on the last day of the "income year"⁵ and constitutes under some circumstances a lien on the last day of the "income year;" and in others on the date the franchise commissioner files with the county recorder a certificate stating that the tax has been demanded and not paid;⁶ a return must in the case of calendar year taxpayers be filed on March 15 of the taxable year;⁷ the tax must be paid in two installments on March 15 and September 15 also of the taxable year;⁸ and, finally, a corporation which dissolves in the taxable year is only liable for that proportionate part of

¹ Section 4 (3), California Bank and Corporation Franchise Tax Act.

² Section 4 (5), California Bank and Corporation Franchise Tax Act.

³ Section 11 (a), California Bank and Corporation Franchise Tax Act.

⁴ Section 11 (b), California Bank and Corporation Franchise Tax Act.

⁵ Section 4 (7), California Bank and Corporation Franchise Tax Act.

⁶ Section 29, California Bank and Corporation Franchise Tax Act.

⁷ Section 13, California Bank and Corporation Franchise Tax Act.

⁸ Section 23, California Bank and Corporation Franchise Tax Act.

the tax as the number of months it exists in the taxable year bears to the entire income year.⁹

The present controversy results from the 1943 amendment to the Bank and Corporation Franchise Tax Act changing the "accrual" date from January 1 of the tax year to December 31 of the income year, and similarly providing that under some circumstances a lien arises on December 31 of the income year instead of January 1 of the tax year, the former provision. As a result of these changes and no others, taxpayer here contends that it is entitled to deduct both the 1943 tax based on 1942 income imposed by the statute prior to the 1943 amendment and the 1944 tax based on 1943 income.

This contention, we think it no overstatement to say, flies in the teeth of some of the most basic and well established principles in federal revenue law and is made in support of an avaricious tax objective that would in effect result in a double deduction for the war-tax year 1943¹⁰ with its resultant understatement and distortion of income not only for 1943 but in some degree for subsequent years as well. The importance of this as a "test" case to the revenue and all corporate taxpayer corporations liable for a 1944 and later California franchise taxes is suggested in the

⁹ Section 13 (k), California Bank and Corporation Franchise Tax Act.

¹⁰ Cf. *Ilfeld Co. v. Hernandez*, 292 U. S. 62, 68; *Burnet v. Aluminum Goods Co.*, 287 U. S. 544, 551; *Spokane Dry Goods Co. v. Commissioner*, 125 F. 2d 865, 867 (C. C. A. 9th); *Levi-Strauss Realty Co. v. United States*, 41 F. 2d 55 (C. C. A. 9th).

opening statement on behalf of the Commissioner (R. 20-21) and in taxpayer's motion for review by the entire Tax Court (R. 61-62).

A. The 1944 California franchise tax was not an accrued deduction in 1943 because it was neither (1) imposed for, and therefore not a cost of business in 1943, nor (2) did all, or even any, of the events creating liability for the tax occur in 1943

Code Section 23 (c) (1), Appendix, *infra*, provides a deduction from gross income for "Taxes paid or accrued within the taxable year." The taxpayer kept its books on the accrual basis by calendar years. (R. 52.) The 1944 California tax return was filed on May 5, 1944, and paid in two installments on March 13, 1944, and September 1, 1944. (R. 50-51.) There is, of course, no question that the deduction could not be taken in 1943 for "Taxes paid." And we think it is just as clear that no deduction could be taken in 1943 for the 1944 tax as "Taxes * * * accrued."

1. *The accrual doctrine in the Supreme Court and the Circuit Courts of Appeals*

The principles which govern deductions for accrued taxes are well established: (1) The obligation to pay the tax must have been "incurred" within the taxable year, i. e., the tax must be imposed for the taxable year in which the deduction is taken—it must be a cost of business of the taxable year; (2) all the events giving rise to and therefore creating a fixed and definite liability for payment must occur in the taxable year—a contingent liability will not suffice. *United States v. Anderson*, 269 U. S. 422; *Security Mills Co. v. Commissioner*, 321 U. S. 281, 284, 286—

287; *Dixie Pine Co. v. Commissioner*, 320 U. S. 516, 519; *Aluminum Castings Co. v. Routzahn*, 282 U. S. 92, 99; *Niles Bement Pond Co. v. United States*, 281 U. S. 357. Cf. *Lucas v. American Code Co.*, 280 U. S. 445; *Brown v. Helvering*, 291 U. S. 193; *American National Co. v. United States*, 274 U. S. 99, 103-105; *Fawcett Machine Co. v. United States*, 282 U. S. 375.¹¹ These and the decisions cited in the footnote are direct authority against taxpayer's position.

The undisputable and controlling facts in this controversy are that the 1944 tax was imposed for the privilege of doing business in 1944 (California Bank and Corporation Franchise Tax Act, Section 4, (3)) and taxpayer so concedes (R. 23) and that as of De-

¹¹ There is no more firmly established principle in tax law and accordingly there are numerous decisions of Circuit Courts of Appeals announcing and applying these rules. A representative group are *Lichtenberger-Ferguson Co. v. Welch*, 54 F. 2d 570 (C. C. A. 9th), and see particularly pp. 571-572; *H. Liebes & Co. v. Commissioner*, 90 F. 2d 932, 938-939 (C. C. A. 9th); *Keller-Dorian Corp. v. Commissioner*, 153 F. 2d 1006 (C. C. A. 2d); *Van Norman Co. v. Welch*, 141 F. 2d 99, 103 (C. C. A. 1st); *George S. Colton Elastic Web Co. v. United States*, 116 F. 2d 202 (C. C. A. 1st); *Commissioner v. Schock, Gusmer & Co.*, 137 F. 2d 750 (C. C. A. 3d); *Citizens Hotel Co. v. Commissioner*, 127 F. 2d 229 (C. C. A. 5th); *Allen v. Atlanta Stove Works*, 138 F. 2d 452 (C. C. A. 5th); *Ed. Schuster & Co. v. Williams*, 283 Fed. 115 (C. C. A. 7th); *Art Metal Const. Co. v. United States*, 17 F. Supp. 854, 864 (C. Cls.); *Triplex Safety Glass Co. of North America v. Latchum*, 131 F. 2d 1023 (C. C. A. 3d); *London-Butte Gold M. Co. v. Commissioner*, 116 F. 2d 478 (C. C. A. 10th). See also Edelman, Time for Accrual & Deduction of Taxes, 23 Taxes, Tax Magazine 110 (1945), for a penetrating discussion of the law as it is and the author thinks it should be from both a legal and accounting viewpoint.

cember 31, 1943, there was no liability for the tax because if the taxpayer did no business in 1944 there would be no tax (R. 29). California Bank and Corporation Franchise Tax Act, Sections 4 (3), and (5), 11 (a) and (b), 13 (k). The conclusion is required by the controlling decisions of the Supreme Court and the Circuit Courts of Appeals that the 1944 tax could not be an accrued deduction for 1943.

The leading case is *United States v. Anderson, supra*. There the taxpayer had deducted in 1917 a munitions tax assessed and paid in 1917 but imposed on profits from the sale of munitions in 1916. The Court in sustaining the Commissioner's position that the deduction was improper in 1917 because it accrued in 1916 rejected taxpayer's accrual test characterized by the Court as a "technical legal sense" that a tax accrues when it has "been assessed and becomes due" (p. 441) for a pragmatic approach based on the purpose of the income tax law. The essence of the decision is that the accrual provisions, Sections 12 (a) and 13 (d) of the Revenue Act of 1916, c. 463, 39 Stat. 756, the forerunners of the Code provisions here involved, were designed to allow (p. 440)—

taxpayers to keep their books and make their returns according to scientific accounting principles, by charging against income earned during the taxable period, the expenses incurred in and properly attributable to the process of earning income during that period.

In applying this principle the Court observed that since taxpayer's (p. 440)—

true income for the year 1916 could not have been determined without deducting from its gross income for the year the total cost and expenses attributable to the production of that income during the year,

it followed that the tax must have accrued in 1916. Recognizing that it might not always be so clear what is a cost of doing business attributable to a given year and in specifically rejecting the “technical legal” argument of taxpayer, the Court also held that a fixed liability for the tax was necessary to accrue it and that such a liability existed in 1916 and before the tax was due or assessed.

Because of the controlling effect of the *Anderson* case, apparently also recognized by taxpayer’s counsel who refer to it extensively (Br. 29, 46, 47, 50, 51, 53), although ignoring the vast body of other relevant Supreme Court decisions other than *Security Mills* and *Dixie Pine, supra*, which they misconstrue, it is desirable in passing to call attention to their patently erroneous view of the case. They typically state, for example (Br. 29):

If the taxing statute contains neither accrual nor lien date, then it is manifestly proper to determine when “liability” arises from all of the provisions of the statute, including a consideration of the nature and character of the tax and of the period *for* which the tax is imposed (*e. g.*, *United States v. Anderson*, 269 U. S. 422 * * *).

We have just observed that *Anderson* makes the

controlling factor the relationship of the tax to the year for which it is imposed and secondly requires that there be a liability for the tax in the accrual year. The statement that these questions are important only when there is neither an "accrual nor lien date" is simply not true. The accrual and lien dates were apparently not even worthy of the "technical legal" characterization given to the assessment date in the *Anderson* opinion because there in fact existed a precisely defined statutory lien date for the munitions tax imposed by Title III of the Revenue Act of 1916 involved in *Anderson*. The opinion of the Court states the tax was due in 1917 (pp. 436, 441) and sections 304 and 305 of the Revenue Act of 1916 so provide. Section 3186 of the Revised Statutes as it then existed and had for more than fifty years prior thereto provided:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, * * *

There is, therefore, no question that the Court in *Anderson* rejected the assessment date and ignored the lien date in favor of the date when there was liability for the tax and the year in which the tax was an expense of the business.

The 1944 California franchise tax is probably more clearly a cost of doing business attributable to the year for which imposed than any other kind of tax because it is, as we have observed, the payment to

the State for the privilege of doing business itself.¹² In addition, so far as the applicability of *United States v. Anderson* is concerned, there was no liability for the tax until business was done in 1944¹³ and in fact the tax liability arose monthly at the rate of one-twelfth of the tax measured by 1943 income (Section 13 (k), California Bank and Corporation Franchise Tax Act R. 28-32), because there is no liability for one-twelfth of the tax for each month the corporation does not exercise its franchise.

Actually, then, this case is on "all fours" with *Anderson*. The only difference is that here taxpayer seeks to deduct the tax a year in advance of the year for which it was imposed and in which it first became a liability whereas in *Anderson* the taxpayer sought unsuccessfully to deduct the tax the year after the year for which it was imposed and first became a liability. The *Anderson* case has been cited with approval in every subsequent case involving accrued deductions. It is law today and dispositive of this case.

¹² The Supreme Court so characterized the California franchise tax in sustaining it against constitutional attack. *Pacific Co. v. Johnson*, 285 U. S. 480. And earlier in *Educational Films Corp. v. Ward*, 282 U. S. 379, 388, the Court stated in sustaining the similar New York franchise tax:

"If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. * * *"

¹³ Cf. *Educational Films Corp. v. Ward*, fn. 12, *supra*.

These propositions were reaffirmed in the last accrual deduction cases considered by the Supreme Court. *Dixie Pine Co. v. Commissioner, supra*; *Security Mills Co. v. Commissioner, supra*. In *Dixie Pine* the Court held that taxpayer could not accrue in 1936 as a deduction a gasoline tax imposed on a solvent used in its 1936 business where it was contesting liability for the tax. The Court said (p. 519):

It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact that the taxpayer's liability for items of indebtedness deducted though not paid; * * *

Citing *United States v. Anderson, supra*. Although the case is not directly in point because there is no contested liability, it is important to note that *Anderson* is expressly approved. The test of accruality reaffirmed in *Dixie Pine* requires an affirmance of the Tax Court because by no stretch of the imagination can it be said that "all the events" fixing "the amount and the fact of taxpayer's liability" occurred in 1943 in view of the incontroverted facts that the tax was imposed, returned, assessed, and paid in 1944. On the contrary, it is accurate to say that none of the events fixing liability occurred in 1943. *Security Mills* involved precisely the same question as *Dixie Pine* except that the tax was a contested processing tax rather than a State gasoline tax. The only discernible legal difference in the two cases was that in *Security Mills* the taxpayer relied on Section 43 of the

Revenue Act of 1934, c. 277, 48 Stat. 680, identical with Section 43 of the Code, Appendix, *infra*. That section provides that for taxpayers on the accrual basis, deductions shall be taken when accrued "unless in order to clearly reflect the income" they should be taken for a different period. Taxpayer, apparently conceding that the tax had not accrued in 1935, the tax year, claimed that it could nevertheless deduct it because under Section 43 an adjustment can be made whenever it is "unjust or unfair" not to. The Court rejected the argument limiting Section 43 because of its legislative history to instances of fixed liabilities payable in fixed installments over a series of years. The decision therefore does not support taxpayer's argument based on it (Br. 55) because absent the Section 43 argument, the case reaffirmed the *Dixie Pine* principle, in turn based on *United States v. Anderson*, that a tax accrues in the year when *all* the events occur fixing the fact and amount of liability.

Actually taxpayer's false reliance on *Security Mills* discloses that it is faced with a dilemma. Assuming *arguendo* that counsel are correct in their position that the liability for the 1944 tax arose in 1943 as well as the 1943 tax based on 1942 income, the "unless" clause of Section 43 of the Code as interpreted in *Security Mills* would permit the Commissioner to place the deduction in 1944 "in order to clearly reflect the income." For the change in the California law on taxpayer's view of this case created a liability in 1943 for the taxes of two years a situation not to be distinguished from liability for interest or rent for

a period of years—the example used in the committee reports when what is now Section 43 first came into the revenue laws by Section 200 (d) of the Revenue Act of 1924, c. 234, 43 Stat. 253. H. Rep. No. 179, 68th Cong., 1st Sess., pp. 10–11 (1939–1 Cum. Bull. (Part 2) 241, 249); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 10–11 (1939–1 Cum. Bull. (Part 2) 266, 273).

But since taxpayer's basic contention is devoid of merit, the tax did not accrue in 1943 and we do not logically reach the "unless" clause of Section 43.

Counsel recognizing the importance of a fixed liability in the years of accrual emphasize that a lien arises on December 31, 1943, for the 1944 tax. Even if the California lien were one indicia of liability it is important to note that the cases require that *all* events which fix liability must have occurred. Taxpayer's emphasis on the lien date further ignores the whole purpose of the accrual system—i. e., to relate the expense of earning income to the income itself. Finally, the ultimate error in their lien date emphasis is that the lien is not even one indicia of liability. Counsel seem to argue that the State having created a lien it must have also created a liability. (Br. 12–19.) The whole structure of the state statute described at the outset of the argument contradicts this conclusion. On December 31, 1943, the taxpayer was not indebted by one cent to the State for 1944 franchise taxes. Nor could it be indebted for the full amount of the tax unless it did business from January 1, 1944, through December 16, 1944. (R. 28–29.) Section 13

(k), California Bank and Corporation Franchise Tax Act. It is perfectly clear then that there was no liability for the tax on the statutory lien date and under California law the purported lien without an obligation to support it is unconstitutional as a taking of property without due process of law. *East Bay Municipal U. Dist v. Garrison*, 191 Cal. 680, oddly enough cited by taxpayer (Br. 18); cf. *Dodge v. Nevada Nat. Bank*, 109 Fed. 726 (C. C. A. 9th). See also Traynor and Keesling, Bank and Corporation Franchise Tax Act, 23 Cal. L. Rev. 51, 73-75.

But even if the lien were valid it does not mark the accrual date under federal law because California often imposes liens for taxes before all the events occur which fix the fact and amount of liability—and the latter and not the lien dates, we again emphasize, are the tests of accrual. Thus, this Court gave priority in a bankruptcy proceeding to liens of California for taxes payable under the Oil and Gas Conservation Act, as well as to liens for franchise taxes and for Los Angeles County personal property taxes over a lien of the United States. *In re Knox-Powell-Stockton Co.*, 100 F. 2d 979.¹⁴ And more recently, also in a bankruptcy proceeding, a California franchise tax lien (under the pre-1943 franchise tax

¹⁴ Counsel's statement that (Br. 15) "Furthermore, the lien date in the *Knox-Powell-Stockton* case was prior to the period for which the tax was imposed" is incorrect. The opposite is true since the Court's opinion states that all three types of liens attached on the first Monday in March of the year for which the tax was imposed. But if counsel's statement was correct, it would only underline the irrelevancy of the lien date as a test of accrual.

amendments) prior in time, was given priority over the perfected lien of the United States. *United States v. Sampsell*, 153 F. 2d 731 (C. C. A. 9th). The Court in emphasizing that the liens were inchoate distinguished the cases arising under Section 3466 of the Revised Statutes (31 U. S. C. 1940 ed., Sec. 191). Examples arising under Section 3466 where liens of the United States were preferred over inchoate state liens are *United States v. Texas*, 314 U. S. 480, and *New York v. Maclay*, 288 U. S. 290. In those cases the Supreme Court gave preference to perfected liens of the United States over prior liens of the States characterized by the Court as “inchoate” because the claim was both unliquidated and uncertain.

The priority of lien cases, then, underline the irrelevancy of the lien date as determinative of the accrual of state taxes for income tax purposes because they establish that in some circumstances liens securing unliquidated and uncertain claims (such as would be California’s claim for 1944 franchise taxes on December 31, 1943) might be recognized though no case has gone that far, and in others they are not, but, in any event, an item to be accrued must be a fixed liability and ascertainable in amount.

It is perfectly plain then, that counsel’s advocacy of the lien date by which to fix the accrual is but a poorly disguised attack on the well settled principles of accrual.

2. *The Tax Court decisions do not support the taxpayer*

Counsel's approach to this case in general is to ignore the controlling decisions of the Supreme Court and the Circuit Courts of Appeals, with the exceptions which we have noted and others that have no bearing on the issue. This is perhaps understandable in view of the fact that they could find no support from those quarters. What is surprising is that they rely largely on decisions of the Tax Court. It is a complete answer to such an approach that in so far as the Tax Court's decisions are out of harmony with those of the Supreme Court and this and other Circuit Courts of Appeals, they are persuasive only of the wrong result and in so far as they differ from the decision below they must have been repudiated by the Tax Court itself in the decision from which this appeal was taken.

That the entire Tax Court is convinced of the correctness of the result below is evidenced by the fact that the presiding judge expressly refused to review the decision (R. 74) after taxpayer had filed a "Motion for Review" (R. 61-74) which included most of the objections to the decision which counsel make here. Moreover, a different Tax Court judge has reached the same result expressly on the authority of the decision below. *Grace Bros., Inc. v. Commissioner*, 10 T. C. No. 21. Still more important that decision was reviewed by the entire court and there were no dissents.

But in any event our reading of the Tax Court decisions cited by counsel shows no inconsistency with the

result here, but on the contrary in so far as relevant, support the decision below. The closest case is *Petaluma & Santa Rosa R. R. Co. v. Commissioner*, 11 B. T. A. 541, which involved the California public utility franchise tax. It was there held that it was improper to accrue the 1921 tax measured by 1920 income until 1921. The reason for that result is the same which we urge here that (pp. 546-547) "If the corporation did not own the franchises and other property in 1921, there was no liability for the tax for that year," and this notwithstanding (p. 547) "the measure existed [in 1920] by which it [the tax] could have been determined, if there was any liability."

Similarly, the other Tax Court cases relied on by counsel in so far as relevant are contrary to their position. For example, *Durst Productions Corp. v. Commissioner*, 8 T. C. 1326, where the Tax Court held that a corporation on the accrual basis, the fiscal year of which ended May 31, 1944, properly accrued for the year ending in 1944, the 1944 tax based on 1944 income. The significant factor in the decision is that it gave effect to the change in the New York Corporation Franchise Law measuring the tax by the income of the "privilege year," rather than the income of the preceding year as had been the case, and is now the case in California. The language which counsel quotes from the opinion that (Br. 51) "The tax being calculated on the amount of earnings for the year in issue its charge against those earnings seems to accord with the theory of accrual" is perfectly correct in the con-

text of that case because the tax and income years coincided. But it is not generally true that a tax is accrued for the year the earnings of which are the measure of the tax. *Petaluma & Santa Rosa R. R. Co. v. Commissioner, supra*. We do not understand counsel to contest this because if the law were otherwise taxpayer has incorrectly deducted his 1943 tax measured by 1942 income. Thus, while *Durst* is correct on its facts the language is too broad. This is the view expressed in Mayer, The Accrual Date of the New York State Franchise Tax, 26 Taxes, Tax Magazine 43 (1948), cited by counsel. (Br. 51.)¹⁵ Neither the decision nor the article suggests that the "lien" date has any relevance in determining the accrual date. In any event, counsel grudgingly concedes as "true" (Br. 53) that an examination of Article 9-A of the New York Tax Law discloses that the 1944 tax lien arises in 1945. This was ignored by both litigants and the court as it was in *United States v. Anderson* and all other non-

¹⁵ The article states (p. 47) :

"Thus, it would seem that with respect to the New York State franchise tax levied under the old statute [e. g., like California's measured by income of the preceding year], the suggestion that it accrues in the measuring period (the court's alternative reason in the *Durst* case) fails to meet the accrual test both accounting-wise and tax-wise.

*

*

*

*

*

we shall find that the decision, in spite of its broad language, probably was not intended, and cannot be held, to apply to taxable years other than the one in issue and, in addition, to a few fiscal periods with respect to which the effect of local law is comparable."

real estate accrual cases¹⁶ because it is patently an irrelevant consideration.

H. H. Brown Co. v. Commissioner, 8 B. T. A. 112, involved the Massachusetts excise tax measured by income of the tax year. The Board properly held the tax assessed as of April 1 of the tax year deductible for the fiscal year ended June 30, 1922. Thus, the tax was imposed for and became a liability for the year deducted which completely supports our position. For a more authoritative view of the accrual year of the Massachusetts excise tax reaching the same result see *George S. Colton Elastic Web Co. v. United States*, 116 F. 2d 202 (C. C. A. 1st). See also *Van Norman Co. v. Welch*, 141 F. 2d 99 (C. C. A. 1st).

The Federal capital stock accrual cases, such as *Atlantic Coast Line Railroad Co. v. Commissioner*, 4 T. C. 140, holding that the tax should be accrued for the year imposed and strongly relied on by counsel (Br. 41, 42), completely support our position that the tax deduction must be related to the business income it is a charge against in order to determine net income.

The numerous other cited Tax Court cases so obviously do not support taxpayer's position, or are not in point, that discussion is unwarranted.

¹⁶ Although as we show, *infra*, real estate taxes are in a separate category, nevertheless, the weight of authority is that even there the lien date is irrelevant.

3. *The decision below gives effect to the Commissioner's consistent administrative practice*

The Commissioner ruled soon after the 1943 amendments to the California Bank and Corporation Franchise Tax were enacted that the tax is deductible in the taxable year. I. T. 3646, 1944-1 Cum. Bull. 104. This ruling was consistent with earlier ones dealing with previous versions of the California tax. I. T. 2770, XIII-1 Cum. Bull. 111 (1934); I. T. 2971, XV-1 Cum. Bull. 107 (1936); I. T. 2988, XV-2 Cum. Bull. 179 (1936). And, as the Tax Court accurately observed, the ruling was "consistent with the treatment accorded other state franchise taxes." (R. 59.) Illinois, I. T. 3186, 1938-1 Cum. Bull. 140; Kentucky, I. T. 3232, 1938-2 Cum. Bull. 70 Maryland, I. T. 3192, 1938-1 Cum. Bull. 144; Massachusetts, G. C. M. 22525, 1941-1 Cum. Bull. 350; Michigan, I. T. 3047, 1937-1 Cum. Bull. 66; New Jersey, I. T. 3887, 1948-2 Cum. Bull. 4; Oklahoma, I. T. 3136, 1937-2 Cum. Bull. 100; Pennsylvania, I. T. 3189, 1938-1 Cum. Bull. 141; Tennessee, I. T. 3150 and 3151, 1938-1 Cum. Bull. 125, 126. Cf. Connecticut, I. T. 2935, XIV-2 Cum. Bull. 91 (1936), and see in this connection Ellis, Deductions for Accrued Taxes, 14 Taxes, Tax Magazine 197 (1936).

In ruling in I. T. 3646, *supra*, that the 1944 California franchise tax accrues in 1944, not 1943, the Commissioner pointed out that (p. 106):

since all the events which fix the amount of the tax and determine the corporation's liability to

pay it have not occurred on the last day of the "income year," the tax does not accrue on that date.

As we have shown, *supra*, this test is not only the weight of authority, there is nothing to the contrary. The I. T. continues that "If it were ruled otherwise, (p. 106) the true net income * * * would not be reflected as required by sections 41 and 43 of the Internal Revenue Code."

Section 41 of the Code (Appendix, *infra*) in essence provides that net income shall be computed in accordance with the method of accounting regularly employed by the taxpayer but if the method does not clearly reflect income, the computation shall be made in accordance with "such method as in the opinion of the Commissioner does clearly reflect the income." There can be no question in view of this provision that the fact that taxpayer accrued the 1944 tax on its books for 1943 is not controlling (*Brown v. Helvering*, 291 U. S. 193, 203; *United States v. American Can Co.*, 280 U. S. 412, 419-420; *Helvering v. Midland Ins. Co.*, 300 U. S. 216, 223; *J. I. Case Co. v. United States*, 65 F. Supp. 464 (C. Cls.); *Commissioner v. Union Pac. R. Co.*, 86 F. 2d 637, 639 (C. C. A. 2d); *Sitterding v. Commissioner*, 80 F. 2d 939, 941 (C. C. A. 4th)), and it is equally clear that Section 41 delegates to the Commissioner unusual authority to determine when an item is properly accruable. The standard is proper reflection of income "in the opinion of the Commissioner." The exercise of this discretion is only reviewable when it is clearly

abused. *Lucas v. American Code Co., supra; United States v. American Can Co., supra*, 419–420. In *American Code*, for example, the Court, in approving the Commissioner's determination that it was improper to accrue a deduction for a liability for breach of contract in 1919 when the breach occurred, but that the accrual occurred in 1922 when judgment was entered against the taxpayer, stated, in referring to the prototype of Section 41 (p. 449):

Much latitude for discretion is thus given to the administrative board [the reference is to the Bureau of Internal Revenue] charged with the duty of enforcing the Act. *Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful.* [Italics supplied.]

We have already shown that it is abundantly clear that taxpayer's accrual of the 1944 tax in 1943 does not properly reflect income. Even if there were some doubt the Bureau's consistent administrative practice under authority of a section expressly conferring wide administrative discretion is entitled to great respect.

Nor should this approach be confused with the holding in *Security Mills, supra*, as taxpayer attempts. (Br. 55.) There the Court rejected the taxpayer's argument based on Section 43 of the Code that notwithstanding when a tax legally accrues, accrual principles may be disregarded in order to give effect to a transaction, rather than yearly-accounting-period basis of reflecting income, if the latter more

clearly reflects income. Here, on the contrary, the taxpayer's method disregarded the settled rules of accrual and the Commissioner in the sound exercise of ~~this~~ discretion has computed taxpayer's income in a matter which clearly reflects income *and* in accordance with well settled rules of accrual.

4. *The property tax cases*

The taxpayer places substantial, if not, principal reliance on the alleged rule that real property taxes are accrued on the lien date. For this proposition it cites (Br. 26) *Magruder v. Supplee*, 316 U. S. 394; *California Sanitary Co. v. Commissioner*, 32 B. T. A. 122; *Crown Zellerbach Corp. v. Commissioner*, 43 B. T. A. 541.

Neither *Supplee* nor *Sanitary* is in point. The question in both was who is the taxpayer, not when does the tax accrue. This obvious and necessary distinction was accurately made not only by the court below (R. 53-54) but in two decisions not cited by counsel by the Circuit Courts of Appeals for the Third and Fifth Circuits in refusing to accept the lien dates as the point of accrual even in property taxes. *Allen v. Atlanta Stove Works*, 138 F. 2d 452 (C. C. A. 5th); *Commissioner v. Schock, Gusmer & Co.*, 137 F. 2d 750. Both decisions emphasized the controlling test of accrual we here contend for, of allocating each year's business to the appropriate portion of the accrued tax so that income is properly reflected. And both courts expressly distinguished

Supplee. The Third Circuit said (p. 753) that the case was concerned with what is “taxes”, not with when taxes accrue and held (p. 754) that property taxes are accruable “not for the year in which they were assessed [and became a lien] but for the year for which they were assessed.” And in *Atlanta Stove* the court said that *Supplee* (p. 452) “did not deal at all with the question here involved [accrual].” See also *Citizens Hotel Co. v. Commissioner*, 127 F. 2d 229 (C. C. A. 5th).

It is true that *Crown Zellerbach Corp. v. Commissioner*, *supra*, reached a contrary result but a later Board case involving the accrual of property taxes distinguished such cases by saying that the lien date was not one of universal applicability, thereby limiting, if not actually repudiating, *Crown Zellerbach, S. E. & M. E. Bernheimer Co. v. Commissioner*, 41 B. T. A. 249, affirmed *per curiam* on authority of *United States v. Anderson*, *supra*, 121 F. 2d 454 (C. C. A. 2d).

Even if there were more persuasive authority for accruing property taxes on their lien date such decisions would not be controlling here. The Supreme Court pointed out in *Supplee* that (p. 399)—

it is misleading to speak of real estate taxes as “applicable” to the fractional part of a tax period following purchase. * * * They are not like rent, nor are they paid for the privilege of occupying property for any given period of time.

This is to be contrasted with the California franchise tax expressly imposed for the privilege of doing business year by year and even month by month. Moreover, when a lien attaches for realty taxes a liability exists and the tax cannot be defeated. The California "lien" is imposed as we have seen before liability arises and notwithstanding that it may never arise. But the Circuit Courts of Appeals for the Third and Fifth Circuits have ignored the fixed liability in favor of giving full effect to relating the tax to the year for which imposed.

B. The time fixed in the California Franchise Act for the accrual of the tax and the attaching of the lien, both as of the last day of the income year, is not controlling for Federal tax purposes

We have already emphasized that the state accrual and lien date, as the date for accruing the subject tax, is inconsistent with well established rules of when to accrue a liability for federal tax purposes because on the state lien and accrual dates none of the events have occurred which determine liability for the tax and acceptance of that date does not relate the tax to the income of the year for which the tax is imposed. Taxpayer argues nevertheless that even if the lien date does not meet the federal test of accrual, the state accrual date governs for federal income tax purposes. (Br. 20-23.)

This argument is directly contrary to the settled principle that federal revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application. Hence their provisions are not to be

taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law. *Estate of Putnam v. Commissioner*, 324 U. S. 393; *Lyeth v. Hoey*, 305 U. S. 188, 193; *Burnet v. Harmel*, 287 U. S. 103, 110; *Palmer v. Bender*, 287 U. S. 551, 555; *United States v. Pelzer*, 312 U. S. 399, 402. *Estate of Putnam* also involved the question of accrual. Specifically, the question was when did declared dividends accrue to a decedent under Section 42 of the Revenue Act of 1938, c. 289, 52 Stat. 447. The Tax Court had decided the question by resorting to state law. In rejecting this approach, the Court said (pp. 395-396):

We think the federal law controls. A federal revenue act applicable throughout the nation fixes liability on the decedent taxpayer under § 42 if the dividend is "accrued." The meaning of that word in this section should be uniform unless Congress has shown an intention to permit its meaning to be varied by state law. [Citing cases.] Section 42 lays down the test of accrual for the taxation of a decedent's income and the definition of the meaning and extent of that test is a federal responsibility. * * *

The Court in drawing a parallel between that situation and *Lyeth v. Hoey*, *supra*, said (p. 396):

In that case an heir received a sum in settlement of litigation over a will. Its taxability as income under the federal statute depended upon the meaning of the statutory exemption "acquired by inheritance." The law of the

testator's domicile held sums paid as will compromises were not inheritances. Acting on the principle that, in the interest of uniformity, exemptions under federal statutes should be determined by federal courts, we reached a contrary federal rule. The same principle leads to our conclusion in this case.

There is nothing in *Commissioner v. Le Roy*, 152 F. 2d 936 (C. C. A. 2d), relied on by counsel (Br. 21-23) to the contrary. The question there as in *Magruder v. Supplee*, *supra*, was whether the taxpayer-purchaser could deduct property taxes he paid but which were assessed prior to his purchase. The court stated (p. 937) "what are taxes and who is the taxpayer depends upon local law." Here, there is no question that Central Investment Corporation is the taxpayer and that California franchise taxes are taxes. When those taxes should be accrued is exclusively a federal question.

George S. Colton Elastic Web Co. v. United States, *supra* (p. 204), is closely in point. There the Circuit Court of Appeals in determining when the Massachusetts excise tax measured both by net income and "corporate excess" accrues refused to be bound by the decision of the Supreme Judicial Court of Massachusetts that the tax was "single". Whether it was or not for the purpose of determining when the tax accrued for federal incomes taxes was a federal question.

In addition to the cases cited under this sub-heading, all the accrual cases cited under sub-heading

“A”, *supra*, show that the only relevance of state law is to determine (1) when *all* the events creating liability occur and (2) the period for which the tax is imposed. Giving full effect to California law for these purposes, the tax accrued in 1944.

C. The scope of the Court's review of this issue is restricted by the
“Dobson” principle

We conclude our argument where taxpayer started his (Br. 10-12) with a discussion of *Dobson v. Commissioner*, 320 U. S. 489. We have not emphasized *Dobson*, not because of non-applicability but because this is not a close case. Rather it is one where if the Tax Court had reached any other result reversal would have been required and in that sense it is superfluous to apply a principle designed to give the Tax Court finality where there is a possibility of two reasonable results. However, if the Court should think that taxpayer's position has some support, the *Dobson* concept must prevail to defeat it. In this connection it must also be noted that taxpayer is met with the firmly entrenched doctrine that deductions are not matters of right but of legislative grace to be strictly construed.¹⁷ This places a further burden in the path of their construction. Moreover, in light of the administrative discretion delegated to the Commissioner by Section 41 of the Code in this type of case as emphasized, *supra*, the Commissioner, not the Tax Court, is entitled to finality barring abuse of dis-

¹⁷ *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, 593, and cases cited; *White v. United States*, 305 U. S. 281, 292; *New Colonial Co. v. Helvering*, 292 U. S. 435, 440; *Helvering v. Ohio Leather Co.*, 317 U. S. 102, 106.

cretion. Here then are operative alternative theories of finality of the result below.

The question here presented is obviously of an accounting nature which the Supreme Court expressly placed within the category of cases not giving rise to a clear-cut question of law in which the decision of the Tax Court is entitled to finality. *Dobson v. Commissioner, supra*, pp. 501-502;¹⁸ cf. *Seattle Brewing & Malting Co. v. Commissioner* and *Commissioner v. Ranier Brewing Co.*, both decided by this Court January 8, 1948, and petitions for rehearing in both denied in an opinion entered February 18, 1948.

Dobson was decided on December 20, 1943. On January 3, 1944, the Court decided *Dixie Pine Co. v. Commissioner, supra*. That case involved the question we have here—namely, in what year should a state tax liability be accrued. A unanimous Court there said (p. 519):

To this effect are the decisions of the Board of Tax Appeals in numerous cases, and the instant decision was in line with earlier rulings as to proper tax accounting practice. Since the Board applied the correct rule of law, its determination that the item in question was not properly deducted on the accrual basis is entitled to the finality indicated by *Dobson v. Helvering, ante*, p. 489. The court below prop-

¹⁸ The Court there said:

“Whatever latitude exists in resolving questions such as those of proper accounting, * * * exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand.”

erly refused to disturb the Board's determination.

Security Mills Co. v. Commissioner, supra, was decided in the next month, on February 28, 1944. As we have pointed out, *supra*, that case involved the precise question as *Dixie Pine*, except that the taxpayer in effect, conceding that the contested tax had not accrued in the year deducted, urged the applicability of Section 43 to circumvent the accrual principles. The Tax Court applied Section 43 and this determination the Court characterized thus (p. 286)—“as matter of law, the Board misconstrued the extent of the power conferred by the Revenue Act.” The question, the Court emphasized (p. 286) “is not whether the Board, within its discretion, made a determination of fact.” But Section 43 was not relied on by the Tax Court here in derogation of accrual principles. Taxpayer's reliance on *Security Mills* is then obviously misplaced and moreover attributes to the Supreme Court a repudiation *sub siliento* of a unanimous opinion rendered only eight weeks before.

CONCLUSION

The Tax Court was correct. It should be affirmed.
Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,

A. F. PRESCOTT,

IRVING I. AXELRAD,

Special Assistants to the Attorney General.

MARCH 1948.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) [as amended by Section 202 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Taxes Generally.*—

(1) *Allowance in General.*—Taxes paid or accrued within the taxable year,

* * * * *

(26 U. S. C. 1940 ed., Sec. 23.)

Part IV—Accounting Periods and Methods of Accounting

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 1940 ed., Sec. 41.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

(26 U. S. C. 1940 ed., Sec. 43.)

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * * *

(c) "*Paid or Incurred*," "*Paid or Accrued*".—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * *

(26 U. S. C. 1940 ed., Sec. 48.)

California Bank and Corporation Franchise Tax Act (3 Deering, California General Laws, 1945 Pocket Supp., Act 8488):

§ 4. *Corporations subject to tax: Tax measurement and computation: Offsets: Exempt corporations.*

* * * * *

(3) [*Other corporations doing business in State: Measurement and computation of tax: Minimum.*].—With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act,

shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner herein-after provided, at the rate of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually to the State, for the said privilege, a minimum tax of twenty-five dollars (\$25).

* * * * *

(5) [*Corporations not otherwise taxed: Amount of tax.*].—Every corporation not otherwise taxed in pursuance of this section and not expressly exempted by the provisions of this act or the Constitution of this State shall pay annually to the State a tax of twenty-five dollars (\$25).

* * * * *

(7) [*When taxes accrue.*].—Taxes under this section and under Sections 1 and 2 of this act shall accrue on the last day of the “income year,” as defined in Section 11 hereof.

* * * * *

§ 11. *Definitions.*—(a) The term “*income year*,” as herein used, means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed herein. “*Income year*” means, in the case of a return made for a fractional part of a year, the period for which such return is made.

(b) The term “*taxable year*,” as herein used, means the calendar year, or the fiscal year ending during such calendar year, for which the tax is payable. A “*taxable year*” may constitute a period of 12 months or of less duration.

* * * * *

(d) The terms “*paid or incurred*” and “*paid or accrued*” shall be construed according to the

method of accounting upon the basis of which the net income is computed hereunder.

* * * * *

§ 13. *Returns: Prepayment of taxes, etc.*

(a) [*Returns.*].—Every bank and corporation subject to the tax imposed by this act shall, within two months and 15 days after the close of its income year, transmit to the commissioner a return in a form prescribed by him, specifying, for the income year, all such facts as he may rule, or otherwise, require in order to carry out the provisions of this act. * * *

* * * * *

(b) [*Prepayment of minimum taxes.*].—A corporation which incorporates or organizes under the laws of this State or qualifies to do business in this State, after the effective date of this act, shall thereupon prepay the minimum tax hereunder, which prepayment must be made before the corporation files with the Secretary of State its articles of incorporation or duly certified copy thereof as the case may be.

* * * * *

(k) [*Dissolved or withdrawn banks or corporations.*].—(1) Any bank or corporation which is dissolved and any foreign corporation which withdraws from the State during any taxable year shall pay a tax hereunder only for the months of such taxable year which precede the effective date of such dissolution or withdrawal, according to or measured by (A) the net income of the preceding income year or (B) a percentage of such net income determined by ascertaining the ratio which the months of the taxable year, preceding the effective date of dissolution or withdrawal, bears to the months of such income year, whichever is the lesser amount; * * * In any event, each such corporation shall pay a tax not subject to offset for such period in an amount

equal to the minimum tax provided for in Section 4 of this act.

* * * * *

§ 23. *Time for payment of taxes: Extension of time: Payment to commissioner: Deposit of moneys received.* * * *

* * * * *

In the case of corporations of the classes referred to in Subdivision (3) of Section 4 of this act, one-half the amount of tax disclosed by the return shall be due and payable as a first installment of the tax on such corporations on or before the fifteenth day of the third month following the close of the income year, as defined in Section 11 hereof. The balance of the tax shall be due and payable as a second installment on or before the fifteenth day of the ninth month following the close of the income year. A tax imposed by this act or any installment thereof may be paid at the election of the taxpayer, prior to the date prescribed for its payment.

* * * * *

§ 29. *Tax lien: Certificate of satisfaction.*

[*Taxes constitute lien: Effect, etc.*].—The taxes imposed by this act and disclosed on the return shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien and shall attach on the last day of the “income year,” * * *. The taxes imposed by this act and determined pursuant to Sections 16, 25 or 28 shall constitute a lien upon all real property of the taxpayer located in any county in which there is filed for record in the office of the county recorder a certificate executed by the commissioner stating that payment of a tax determined under the provisions of Sections 16, 25 or 28 of this act has been demanded and has not been paid and specifying the amount

thereof and the name of the taxpayer, and such lien shall attach at the time the certificate is recorded and shall have the same force, effect and priority as a judgment lien. The lien provided for in this section shall remain until the taxes are paid or the property subject to the lien is sold for the payment thereof, or until the lien is released or otherwise extinguished. * * *

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (c)-1. (a) *In general*.—Subject to the exceptions stated in this section and sections 29.23 (c)-2 and 29.23 (c)-3, taxes imposed by the United States, any State or Territory, or political subdivision of either, possessions of the United States, or foreign countries, are deductible from gross income for the year in which paid or accrued (see section 43). * * *

SEC. 29.41-1. *Computation of net income*.—* * * The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 29.42-1 to 29.42-3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

SEC. 29.41-2. *Bases of computation and changes in accounting methods*.—Approved standard methods of accounting will ordinarily

be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48 for definitions of "paid or accrued" and "paid or incurred." All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. * * *

SEC. 29.41-3. *Methods of accounting.*—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. * * *

SEC. 29.43-1. *"Paid or incurred" and "paid or accrued."*—(a) The terms "paid or incurred" and "paid or accrued" will be construed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. (See section 48 (c).) The deductions and credits provided for in chapter 1 (other than the dividends paid credit provided in section 27) must be taken for the taxable year in which "paid or accrued" or "paid or incurred," unless in order clearly to reflect the income such deductions or credits should be taken as of a different period. * * *

SEC. 29.43-2. *When charges deductible.*—Each year's return, so far as practicable, both as to gross income and deductions therefrom, should be complete in itself, and taxpayers are expected to make every reasonable effort to ascertain the facts necessary to make a correct return. The expenses, liabilities, or deficit of

one year cannot be used to reduce the income of a subsequent year. A taxpayer has the right to deduct all authorized allowances, and it follows that if he does not within any year deduct certain of his expenses, losses, interest, taxes, or other charges, he cannot deduct them from the income of the next or any succeeding year. * * *

No. 11,796

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CENTRAL INVESTMENT CORPORATION,
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

BRIEF AMICUS CURIAE.

GEORGE H. KOSTER,
Attorney at Law,
300 Montgomery Street, San Francisco, California,
Amicus Curiae.

FILED

MAR 10 1948

PAUL P. O'BRIEN, CLERK

Table of Authorities Cited

| Cases | Pages |
|---|--------------|
| Budd International Corp., 45 BTA 737 | 4 |
| California Sanitary Co. Ltd. (1935), 32 BTA 122..... | 5, 6, 7 |
| Crown Zellerbach Corp. (1941), 43 BTA 541 (CCA 9, 1942) | 6, 10 |
| Godfrey L. Cabot (1939), 40 BTA 366 | 10 |
| Magruder v. Supplee (1942), 316 U. S. 394..... | 7 |
| The Pacific Co. Ltd. v. Johnson (1932), 285 U. S. 480, affg. 212 Col. 148 | 10 |
| U. S. v. Anderson (1926), 269 U. S. 422..... | 4 |
| U. S. v. Detroit Moulding Corp. (D.C. Mich. 1944), 56 F. Supp. 754, 32 AFTR 1374 | 4 |

Statutes

| | |
|--|----|
| California Bank and Corporation Franchise Tax Act: | |
| Section 4(7) | 2 |
| Section 13(k) | 10 |
| Section 29 | 2 |
| Internal Revenue Code, Section 23(c) | 5 |

Miscellaneous

| | |
|--|-------|
| GCM 15305 CB XIV-2 p. 80 | 9, 10 |
| GCM 13681 CB XIV-1 p. 58 | 4 |
| GCM 21373 CB 1939-2 p. 82 | 10 |
| I. T. 3446, CB 1944, p. 104 | 8 |
| Prentice-Hall State and Local Tax Service, Vol. 2 (Cal.), para. 13062 | 11 |
| Prentice-Hall Federal Tax Service, Vol. 2, par. 13123(e)... | 7 |

No. 11,796

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CENTRAL INVESTMENT CORPORATION,
Appellant,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

BRIEF AMICUS CURIAE.

This brief is submitted in support of the proposition that the date fixed by the California Bank and Corporation Franchise Tax Act as the date of accrual of the franchise tax imposed thereunder (which date is also fixed by said statute as the date when a lien for the tax attaches), is the date of accrual of the tax for federal income tax purposes, and the tax is deductible in the year in which that date of accrual falls where the taxpayer keeps its books and files its tax return on an accrual basis of accounting; and the Tax Court erred as a matter of law in the above entitled case in refusing to accept that date as the accrual date and in fixing a different and arbitrary date as the accrual date.

Section 4(7) of the California Bank and Corporation Franchise Tax Act fixes the date of accrual of the tax imposed thereunder as the last day of the "income year" (which is the year on the basis of the income of which the tax is computed); and Sec. 29 of said act provides that a lien for the tax imposed by the act disclosed on the return, shall attach on the last day of the income year upon the real property of the taxpayer.

In this case the Tax Court decided, and we believe the decision to be in error, that the California franchise tax computed on the income of the taxpayer for the year 1943 and imposed on the franchise for the privilege of doing business in 1944 accrued on January 1, 1944, and was an accrued expense for federal tax purposes in 1944 and was deductible in that year rather than in 1943, even though under the California Franchise Tax Act the accrual date and the lien date is fixed as December 31, 1943. The Tax Court described the franchise tax as follows:

"The franchise tax is imposed for the privilege of doing business during the 'taxable year.' It is true that such tax is measured by the preceding year's income, but it is not an income tax on such income, but rather an excise tax for the privilege of doing business in the 'taxable year' subsequent to the 'income year.' That the tax is essentially a tax on the privilege of doing business in the 'taxable year' is clear from the terms of the act and further from the fact that withdrawal or dissolution relieves the taxpayer from taxation for the period of the 'taxable year' during which the franchise privilege is not exercised."

The determination of the year in which an “accrued expense” is deductible is not something which can be accomplished by mere application of a definite rule or formula. There is no such rule or formula. It is a matter of sound judgment, and yet it is fundamentally a question of law as evidenced by the many cases considered by the Courts involving that question. In this case there is not only the question of—when does the Franchise Tax accrue? but also the question—can the Courts substitute a different time of accrual for this tax than the date specifically fixed in the taxing act as the date of accrual and the date when the lien for the tax attaches? This unquestionably raises a question of law.

Generally, it might be said that an expense accrues ratably over the period to which it applies. For example, if a fire insurance policy is written for a three year period it might be proper to “accrue” the expense of the policy over the three year period; or in the case of interest on a loan it might be proper to “accrue” the interest daily though it may be payable but once a year. The theory behind such “accrual” is that a spread of the expense in such a manner is necessary to reflect the proper income for the respective accounting periods affected by the expense.

But there are cases where the expense is not determinable until a certain date when the events occur which fix the amount and the liability for the tax. In such case the “accrual” of that expense occurs on that date and the expense is attributable to the year in which that date falls. For example, it has been held

that a munitions tax payable upon income from sale of munitions in a taxable year accrues at the end of the year even though the tax was not assessable or payable until the following year (*U. S. v. Anderson* (1926), 269 U.S. 422, in which the Court recognizes “In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of the tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it.”)

Although this might indicate the possibility of a year-end date as an accrual date of any expense computable on that year's operations, the authorities do not support any such general rule. For example, the federal capital stock tax was an excise tax for the privilege of doing business in a fiscal year July 1 to June 30, and that tax was held to accrue at the *beginning* of the period even though not computable or payable until after the end of the period. (GCM 13681 CB XIV-1 p. 58; *Budd International Corp.*, 45 BTA 737 at 753, in which the Board indicated however that if a different accounting method of accruing this tax were used by the taxpayer it might be acceptable.) It is possible too that only the amount estimated as the ultimate tax is the proper accrual at the beginning of the period and any difference between the estimated and actual tax is accruable at the end of the period. (*U. S. v. Detroit Moulding Corp.* (D.C. Mich. 1944), 56 F. Supp. 754, 32 AFTR 1374.)

In these cases and other similar cases the statute imposing the tax was silent as to the date of accrual

of the tax, so it was necessary to reach out for any logical theory on which to make a determination of the accrual date, with the result that there is no established rule or principle which can be applied to every case, and rules were devised and applied dependent solely upon the judgment of the reviewing Court as to what might be logical and fair in the particular situation. It might well be said that there is no established authority which would bind this Court to any particular conclusion, especially so since this is the first time the question of the time of accrual of the California franchise tax under the Franchise Tax Act as amended in 1943 has come before an Appellate Court. The income tax statute (Sec. 23(c) Internal Revenue Code) provides only that there shall be allowed as a deduction "Taxes paid or accrued within the taxable year". We respectfully submit that it appears logical and fair and therefore lawful, that if the legislature when enacting a tax statute expressly provides for the date of accrual of the tax, that date should be accepted and there should be no occasion for groping around for some theoretical basis for fixing a different date as the accrual date.

The Courts and the Commissioner of Internal Revenue have considered cases involving the accrual date of taxes where the accrual date or the lien date has been fixed by statute. One of the earliest of those cases was the case of *California Sanitary Co. Ltd.* (1935), 32 BTA 122, involving the accrual date of California real property taxes. In that case it was held that California real estate taxes accrue on the first Monday in March, which is the day on which the

lien for the taxes attached, regardless of the fact that the tax is imposed for the period July 1 following the lien date to July 1 of the next year and regardless of the fact too that the tax is not payable until the November following the lien date. In the *Central Investment Corporation* case before this Court the Tax Court says that the *California Sanitary* case is distinguishable because it involved property taxes, the personal liability for which arises by virtue of ownership at a specified time and because the case is authority only for the proposition that a transfer of the property subsequent to the existence of a personal liability for the taxes thereon has no effect on such liability.

The effect of the *California Sanitary* case goes further than indicated by the Tax Court. It is true that in that case an owner of property on the first Monday of March in the tax year transferred the property the following June and the transferee endeavored to deduct the real estate taxes paid by it on that property later in the year, contending that the tax should be held to accrue over the tax year July 1 to July 1 for which it was imposed. The Tax Court held, however, that the tax accrued when it became a lien and that that date must be held to be the date fixed by statute. Under that holding the owner of the property on the first Monday in March is entitled to take the deduction for the full amount of the taxes which became a lien on that date if he keeps his books on an accrual basis. In *Crown Zellerbach Corp.* (1941), 43 BTA 541, appeal dismissed by Stip. CCA-9-1942, the Board in sustaining the Commissioner stated:

“The respondent takes the lien date of each state—March 1, 1937, in Oregon and Washington, and the first Monday in March, 1937, in California—and, treating the taxes as accrued on that date, *requires the deduction in petitioner’s fiscal year ended April 30, 1937, of the year’s taxes which accrued on those lien dates in the respective states*” (Italics ours).

See also *Magruder v. Supplee* (1942), 316 U.S. 394, a case somewhat similar to the *California Sanitary* case, and the comment thereon in 1948 Prentice Hall Federal Tax Service, Vol. 2, par. 13123(c) as to its application in determining the deductibility of the tax.

In this case the Tax Court justifies its action in ignoring the accrual date fixed by statute with the following explanation:

“* * * on the last day of the ‘income year’ we are unable to see how any liability can arise for a tax imposed on the privilege of doing business for a year not yet commenced. It is true that on the last day of the ‘income year’ the facts are available which may constitute one of the basic elements of the prospective tax computation and it may also be that then it may seem almost inevitable that some liability will arise by virtue of the next day being the first day of the ‘taxable year.’ But however inevitable its prospective existence may seem on the last day of the ‘income year,’ the tax being for the privilege of doing business in the taxable year, the liability therefor arises only with and from the exercise of such privilege. If no business operations were carried

on in the taxable year the tax would not be imposed.”

Apart from the Tax Court's difficulty about the fixing of “liability” which is easily answered as will hereinafter be demonstrated, the Tax Court applies a rather extreme test in concluding that the taxpayer might go out of business before January 1, 1944, so might not be subject to tax, and for that reason the tax cannot be held to be accrued until at least the first day of the new year had passed and the taxpayer had done business on that day. This was the theory advanced by the Commissioner in I. T. 3446, CB 1944, page 104, the Commissioner contending that the tax accrues on January 1 of the “taxable” year. The Tax Court makes no mention of what the situation might be if the corporation did no business after January 1. It would be just as much entitled to a refund or abatement of the franchise tax if it dissolved and went out of business on January 2 as it would if it went out of business on midnight of December 31, or on January 1. Certainly the equities or the force of the argument is no stronger in favor of January 1 of the taxable year as an accrual date than the argument in favor of December 31 of the income year as an accrual date. In fact, the argument is not even as strong because there is always the fact that the California Legislature definitely fixed December 31 as the accrual date to support the contention that that is the proper accrual date.

We think the Tax Court might have used a better test, the test of what would generally occur in the

normal course of events. In the normal course of events the corporation will continue in business over the term of its charter and it would seem more practical to presume that it will exercise its privilege of doing business in the taxable year, than to presume that it will not until it actually performs some action on the first day of the taxable year. The Commissioner himself recognizes this "normal course of events test". In GCM 15305 CB XIV-2 p. 80 he considered the time of accrual of a New Jersey real property tax for 1928 assessed against the owner of the property as of October 1, 1927 under the taxing statute. The Commissioner held that the tax accrued on October 1, 1927 the assessment date, and in answer to the contention that the owner on October 1 may not be the person who pays the tax when it is levied at a later date, stated:

"In the normal course of events the owner of real property in New Jersey on October 1 of any given year will pay the taxes levied as of that date. This is sufficient for the purpose of accrual. The Bureau's position that liability for real property taxes is incurred by reason of ownership of the property on the day as of which the assessment is made has been sustained by the Board of Appeals in its recent decisions on the subject. (See Texas Coca Cola Bottling Co. v. Com. 30 BTA 736 and California Sanitary Co. Ltd. v. Com. 32 BTA 122.)" (Italics ours.)

The Commissioner, and to some extent the Courts, have not had too much difficulty in fixing the assessment or lien dates prescribed by the taxing act, as the date of accrual of property taxes for purposes of de-

termining its time of deductibility for federal income tax purposes. (GCM 15305 *supra*, GCM 21373 CB 1939-2 p. 82; *Crown Zellerbach Corp.*, *supra*; *Godfrey L. Cabot*, 1939, 40 BTA 366). The franchise tax is an excise tax in the nature of a property tax since it is a tax on the franchise. (*The Pacific Co. Ltd. v. Johnson*, 1932, 285 U.S. 480 affg. 212 Col. 148.)

The answer to the Tax Court's argument that "we are unable to see how any liability can arise for a tax imposed on the privilege of doing business for a year not yet commenced" is obvious. The Tax Court might also have said—we are unable to see *how a lien* can attach for a tax imposed on the privilege of doing business for a year not yet commenced. The same answer applies to both, and that is that the California Franchise Tax Act *fixes the date* of accrual of liability and lien, so that the accrual and lien date for franchise tax based on 1943 income upon the franchise or for the privilege of doing business for the year 1944 is fixed by the Act as December 31, 1943.

If the corporation dissolves or withdraws before January 1, 1944 it is *relieved from payment* of any accrued tax. (Sec. 13(k) of the Franchise Tax Act.) As between the State of California and the taxpayer there can be no question that December 31, 1943 is the accrual and lien date as fixed by the Franchise Tax Act. Just because the Tax Court was "unable to see how" the tax could accrue before January 1, does not justify the Tax Court in substituting its judgment as to what the accrual date ought to be, for that of the California Legislature which specifically fixed the accrual date.

The Tax Court advances the theoretical argument that the tax is an expense attributable to 1944 and that it must be deducted in the year to properly reflect income. As a practical matter, this argument is entirely without foundation. To properly reflect income the tax should be allowed as a deduction in the year upon the income of which it is computed. This was probably the very thing which induced the California Legislature to amend the Franchise Tax Act in 1943 so that taxpayers would get a deduction in the income year, for the franchise tax computed upon that income, and thus be certain of a tax benefit from the deduction.¹ Under the Act before its amendment the accrual date was fixed as the first day of the "taxable year" so the tax on the income of the "income year" was deductible in the following "taxable year" and the possibility of a federal tax benefit from the deduction was dependent upon whether the taxpayer would have adequate income in the following taxable year. In this case the Tax Court ruled that the accrued date of the tax is the same after the amendment as before, and disregards the specific change of the accrual date effected by the amendment.

We respectfully submit that in this case the time of accrual of the franchise tax in determining the period

¹Letter from California Franchise Tax Commissioner to Prentice-Hall, Inc. dated Jan. 7, 1944 and reported in Prentice-Hall State and Local Tax Service Vol. 2—Calif.—para. 13062, stating:

"As to effect of 1943 amendment of Sec. 4(7) of California Bank and Corporation Franchise Tax Act legislature intended to place corporations doing business in California on a current basis for federal tax deduction purposes. As to its effect on 1943 federal returns, this office does not desire to express any opinion * * *"

for which it is deductible for federal tax purposes should be the accrual and lien date fixed by the statute which imposed the tax, which is the last day of the income year. The income year under consideration here is 1943, so the franchise tax computed on the basis of the income for the year 1943 should be allowed as a deduction for federal tax purposes in the year 1943.

Dated, San Francisco, California,
March 18, 1948.

Respectfully submitted,
GEORGE H. KOSTER,
Attorney at Law,
Amicus Curiae.

No. 11796

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL INVESTMENT CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court
of the United States.

REPLY BRIEF FOR PETITIONER.

JOSEPH D. BRADY,
JOHN O. PAULSTON,
c/o Brady & Nossaman,
433 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

TOPICAL INDEX

| | PAGE |
|---|------|
| Answer to respondent's argument | 2 |
| 1. Respondent's basic contention..... | 2 |
| 2. Respondent's contention that a double deduction is involved herein | 2 |
| 3. Respondent's discussion of "The accrual doctrine in the Supreme Court and the Circuit Court of Appeals"..... | 3 |
| 4. Respondent's argument that "The Tax Court decisions do not support the taxpayer"..... | 17 |
| 5. The Commissioner's administrative practice..... | 18 |
| 6. Respondent's discussion of "The Property Tax Cases"..... | 21 |
| 7. Respondent's consideration of the accrual and lien provisions of the California Franchise Tax Act..... | 25 |
| 8. Respondent's discussion of the "Dobson" principle..... | 28 |
| Conclusion | 30 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|--|-----------------------------------|
| Allen v. Atlanta Stove Works, 138 F. (2d) 452..... | 22, 25 |
| Atlantic Coast Line R. Co., 4 T. C. 140..... | 22 |
| Bernheimer, S. E., 41 B. T. A. 249..... | 14, 23 |
| Budd International Corp., 45 B. T. A. 737, reversed on other grounds, C. C. A. 3, 1944, 143 F. (2d) 784..... | 22 |
| California Sanitary Co., Ltd., 35 B. T. A. 122..... | 21 |
| Cole v. Commissioner, 81 F. (2d) 485..... | 20 |
| Commissioner v. Rainier Brewing Co., F. (2d), 1948 P.-H. Fed. Tax Serv., pars. 72,316 and 72,373..... | 29 |
| Commissioner v. Schock, Gusmer & Co., 137 F. (2d) 750..... | 22, 24 |
| Commissioner v. Le Roy, 152 F. (2d) 936..... | 30 |
| Crown-Zellerbach Corp., 43 B. T. A. 541..... | 13, 15, 21, 22, 23 |
| Dixie Pine Products Co. v. Commissioner, 320 U. S. 516, 64 S. Ct. 364, 88 L. Ed. 270..... | 9, 15, 17, 21, 29 |
| Dobson v. Commissioner, 320 U. S. 489..... | 28, 29, 30 |
| East Bay Municipal Utility District v. Garrison, 191 Cal. 680.... | 15 |
| Fawcus Machine Co. v. United States, 282 U. S. 375..... | 12 |
| George S. Colton Elastic Web Co. v. United States, 116 F. (2d) 202 | 27 |
| Helvering v. Enright's Estate, 312 U. S. 636..... | 26 |
| Helvering v. Russian Finance & Construction Co., 77 F. (2d) 324 | 10 |
| Knox-Powell-Stockton, In re, 100 F. (2d) 979..... | 15 |
| Lifson v. Commissioner, 98 F. (2d) 508..... | 22 |
| Magruder v. Supplee, 316 U. S. 394, 62 S. Ct. 1162, 86 L. Ed. 1555..... | 5, 13, 15, 17, 21, 22, 24, 26, 28 |
| Pacific Company v. Johnson, 285 U. S. 480..... | 6 |

iii.

| | PAGE |
|--|------|
| Putnam, Estate of, v. Commissioner, 312 U. S. 399..... | 26 |
| Seattle Brewing & Malting Co. v. Commissioner, F. (2d) | |
|, 1948 P.-H. Fed. Tax Serv., pars. 72,315 and 72,372..... | 29 |
| Security Flour Mills Co. v. Commissioner, 321 U. S. 281..... | |
|16, 17, 21, 29, 30 | |
| United States v. Anderson, 269 U. S. 422..... | |
|3, 4, 5, 6, 7, 8, 9, 13, 14, 17, 23, 28 | |
| United States v. Sampsell, 153 F. (2d) 731..... | 15 |

STATUTES, REGULATIONS AND RULINGS

| | |
|---|--------|
| California Constitution, Art. XIII, Sec. 8a..... | 25 |
| I. T. 2971, XV-1 C. B. 111 (1934)..... | 19 |
| I. T. 2988, XV-2 C. B. 179 (1936)..... | 19 |
| I. T. 3151 ³⁸⁷⁶ , 1947-1 C. B. 17..... | 16 |
| I. T. 3646, 1944-1 C. B. 104 | 18, 19 |
| Internal Revenue Code, Secs. 42..... | 26 |
| 43 | 15, 16 |
| 48 | 26 |
| 322(d) | 30 |
| California Franchise Tax Regulation, Article 29-1, par. 2, Cal. | |
| C.T. pars. 8-053..... | 11 |
| Renegotiation Act (Act of April 28, 1942, Public Law 528, | |
| 77th Cong.), Sec. 403(a)(4)(B)..... | 6 |
| California Bank and Corporation Franchise Tax Act, | |
| Sec. 13(j) | 12 |
| 13(k) | 12 |
| 13(l) | 12 |
| 13(o) | 6 |
| Renegotiation Regulations, Secs. 389..... | 7 |
| 389.5 | 7 |
| 391.1 | 7 |
| Revenue Act of 1943, Sec. 701(b)..... | 6 |

| | |
|---|----|
| Paul, Randolph, "Selected Studies in Federal Taxation," Second Series, p. 23..... | 26 |
|---|----|

No. 11796
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL INVESTMENT CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court
of the United States.

REPLY BRIEF FOR PETITIONER.

Certain aspects of respondent's preliminary statements in his brief, including the Statement of the Question Presented, the Statement of the Case, and the Summary of Argument, are not wholly without objection. The objections thereto will all abundantly appear in our direct discussion of respondent's argument, however. We will therefore not discuss separately these portions of respondent's brief.

ANSWER TO RESPONDENT'S ARGUMENT.

1. Respondent's Basic Contention.

Before answering the specific arguments of respondent, it is important to observe that his entire case is based upon the proposition that the express provisions of the California Franchise Tax Act designating the date for the accrual of the tax and the attaching of the lien therefor have no effect for Federal tax purposes. (Br. 31 *et seq.*) However, under the form of presentation adopted by respondent, this is not made clear until after he has presented the principal part of his argument. (Br. 11-31.) Nevertheless, respondent's whole case must stand or fall on this proposition.

2. Respondent's Contention That a Double Deduction Is Involved Herein.

In footnote 10 (Br. 10), respondent refers to four decisions concerning double deductions, including two decisions by this Court. It is apparent from even a cursory reading of them, however, that they have absolutely no application to the problem here presented. They all relate to efforts by taxpayers to obtain a double tax benefit from the same expense or other deduction. Manifestly, the petitioner herein is not seeking a double deduction in the sense in which that term is used in the cited cases. Here, there is no question that the taxpayer is entitled to the deduction for both the franchise taxes, based on its 1942 and on its 1943 income. There is no effort to obtain the *same* deduction twice. It is simply a question of what year is the proper one in which to take certain deductions to which the taxpayer is admittedly entitled.

3. Respondent's Discussion of "The Accrual Doctrine in the Supreme Court and the Circuit Court of Appeals."

Respondent cites, as being "direct authority against taxpayer's position," twenty-one cases. (Br. 11-12.) Not one of them is directly in point. However, only the cases that respondent deems to be of sufficient importance to justify further discussion of their precise application to the issue herein will be considered in answering respondent's detailed argument.

Petitioner accepts *United States v. Anderson* (1926), 269 U. S. 422, as a leading case (see Br. 13) on the subject of accrual and deduction of taxes, but thinks it somewhat of an overstatement to say (Br. 16) that it is on all fours with the present case. To the extent to which it is applicable herein, it favors petitioner rather than respondent.

In the first place, it should be emphasized that in the *Anderson* case it was the taxpayer who was contending that the accrual of the tax did not occur until in the year in which it was assessed and became payable. The Supreme Court rejected this contention, however, upon the ground that the determination of the time for accrual should not be made in "any technical legal sense." It held that, in an economic sense, the tax had accrued in the preceding year in which the income was earned on which the tax was imposed.

Thus, from a practical standpoint the positions of the parties in the *Anderson* case are reversed in the present case. Here it is the petitioner that is contending that the tax accrued in the year in which the income was earned on which the tax is based, rather than in the later year in which the tax was assessed and became pay-

able. Of course, respondent will say that here the tax was “for” the latter year. On the other hand, petitioner asserts that if it is material at all to show that the tax is “attributable to” the year of accrual, this requirement is met here. This latter point will be discussed more fully hereinbelow.

It is submitted that all that the *Anderson* case held in regard to the time for accrual of taxes is that they must be accrued when, in an economic and bookkeeping sense, rather than in a technical legal sense, all of the events have occurred which fix the amount of the tax and determine the liability to pay it. It does *not*, as respondent contends (Br. 11), establish *two* principles governing the deduction of accrued taxes, viz., (1) that the tax must be imposed *for* the taxable year in which the deduction is taken, *and* (2) that all of the events giving rise to a fixed and definite liability must occur in the taxable year. Petitioner will consider each of these alleged requirements, in the order thus stated.

There is no requirement whatever that the tax be “for” the year in which deduction is taken. True, the Supreme Court, in the *Anderson* case, said that the purpose of the provisions of the Revenue Act there in question authorizing the use of the accrual method in computing net income was to enable taxpayers to keep their books and make their returns “by charging against income earned during the taxable period, the expenses incurred in and properly *attributable to the process of earning income* during that period * * *” (269 U. S. 422 at 440; emphasis added.) However, when it came to the point of deciding when the taxes on the income from munitions sales in 1916 *were properly accruable*, the Court considered only whether “liability” for

the tax had arisen in 1916. Thus, it in effect held that to the extent that general accrual principles require accrual of items in the year to which they are attributable, this requirement is satisfied in the case of tax charges by determining the year in which *liability* for the tax arose. The Court did *not* decide that, in addition to finding such “liability”, the tax had to be *for* 1916.

True, the tax involved in the *Anderson* case *was* “for” 1916; but the Court did not make this a basis for its decision on the issue of when the tax accrued. That this must have been deliberate is evidenced by the fact that on other occasions the Supreme Court has held that taxes accrue when liability therefor arises without regard to whether they are “for” the period in which such liability arises. (*Magruder v. Supplee* (1942), 316 U. S. 394, 62 S. Ct. 1162, 86 L. Ed. 1555.) The *Anderson* and *Supplee* cases contain no element of inconsistency if the former is recognized as holding, simply, that taxes accrue in and are attributable to the year in which liability therefor arises.

It is further submitted, however, that even if the *Anderson* case does impose some requirement over and above the requirement that liability be established in the year of accrual, such additional requirement is not as stated by respondent. For the precise language of the *Anderson* case in regard to the accrual of liabilities generally is that such method of accounting was designed to enable taxpayers to charge against income earned during a given period the expenses incurred “and properly attributable to the process of earning income during that period.” Respondent has transposed this into the statement that the tax must be *for* the year in which it is accrued. It is submitted that this transposition is both important and unjustified. For, if the language thus used by the Su-

preme Court is applied in a realistic manner rather than in a technical legal sense, it is clear that the California franchise tax is "attributable to the process of earning income" during the "income" year, even though it may not be "for" that year in the sense in which respondent uses the latter term.

Thus, the historical background of the California franchise tax discloses beyond doubt that the *only* reason for imposing the tax as a tax for the privilege of doing business, with the amount of the tax *measured by* net income, instead of imposing a tax directly *upon* net income, was to enable the State to conform its scheme of taxation of corporations to a permitted method of taxing banks without discrimination against the latter but with the inclusion of the income from tax exempt securities in the base for the tax. (*Pacific Company v. Johnson* (1931), 285 U. S. 480, 491-492.) In a business and economic sense, however, the *burden* of the tax is precisely the same as though it were a tax *on* income, as in the *Anderson* case. The tax based upon the income of the "income year" is required to be paid regardless of whether there is any income at all from the operation of the business during the privilege year. The tax based upon the income of the "income year" is required to be paid in full regardless of whether the corporation has a "taxable year" of twelve months or of less duration. [Act, Section 13 (o), Op. Br. Appendix 13.] In an economic and business sense, then, it is clear that the tax is attributable to and a charge upon the income upon which it was based.

This view is directly confirmed by the manner in which Section 403(a)(4)(B) of the Renegotiation Act (Act of April 28, 1942, P. L. 528, 77th Cong., as amended by Section 701(b) of the Revenue Act of 1943) and the

regulations thereunder require taxes such as the California franchise tax to be taken into account. The application of this provision to state “income taxes” is stated in the Renegotiation Regulations as set forth in the footnote.¹

¹389. *State Income Taxes.*

389.1. *In General.* Under subsection (a) (4) (B) of the 1943 Act, taxes measured by income cannot be allowed as items of cost for purposes of renegotiation. However, this subsection provided specifically that in determining the amount of excessive profits to be eliminated, proper adjustment shall be made on account of the taxes measured by income (other than Federal taxes) so excluded, *which are attributable to* non-excessive renegotiable profits. The amount of any such adjustment will in no case exceed that part of such taxes actually payable which is payable because of the inclusion in income of the non-excessive renegotiable profits. The term “taxes measured by income” is interpreted to mean taxes which vary in accordance with the amount of net income of the taxpayer. Such term does not include taxes imposed upon or measured by gross income, gross receipts or sales. Such taxes measured by net income are herein referred to generally as “state income taxes” although actually they may not be designated as “income taxes” in the legislation imposing such taxes, and although they may be imposed by political subdivisions other than a state. * * *

* * * * *

389.5. *State Income Tax Measured by Income for Preceding Year.* In some states, the tax is measured by the income for the year subject to renegotiation but is a liability of the contractor not for such year but for the next succeeding year. *In this event, the adjustment for such tax will be made as though such tax measured by the income subject to renegotiation were in fact a liability for the year subject to renegotiation.* (Emphasis added.)

Therefore, although the tax may be “for” the privilege year, it is, in the language of the *Anderson* case, only in a “technical legal sense”, if at all, that the tax is “attributable to” the privilege year. Further, in the language of that case, in an economic sense a taxpayer’s true income for the income year could not have been determined without deducting from its gross income for the year the franchise tax based upon the production of that income.

Notwithstanding the true economic situation was as thus stated, the tax statute, prior to the 1943 amendments, expressly provided that the tax accrued and became a lien on the first day of the "taxable year." On the face of the statute, then, all taxpayers were seemingly "tied" to an accrual and deduction of the tax according to its technical legal aspects rather than according to its real economic burden. And this is the view taken by the Commissioner in his rulings under the earlier statute. Accordingly, the Act was amended in 1943 to establish the accrual and lien date as the last day of the income year rather than the first day of the taxable year, in order to conform the technical accrual with the economic realities.

Thus, even if it were to be assumed that a purely arbitrary accrual and lien date in advance of the period "for" which the tax was imposed would not be controlling for Federal income tax purposes—an assumption which is directly opposed to the decisions giving effect to the arbitrary lien date in property tax cases—it is clear that in the present case the California Legislature has *not* arbitrarily or capriciously selected an accrual and lien date. Rather, it has abandoned a date which had significance in a technical legal sense only, in favor of a date which makes the establishment of liability for the tax conform to the economic realities in regard to the burden of the tax. There is nothing in the *Anderson* case or in any other case that would support the Commissioner in disregarding such a provision of the controlling local law.

It is submitted, then, that if the requirement of the *Anderson* case that the tax be attributable to the earning of the income in the year in which accrual of the tax is claimed calls for something *more* than proof that "lia-

bility” for the tax arose in such year, such “additional” requirement is abundantly met in the present case.

But what of the “second” principle of the *Anderson* case, viz., that all of the events giving rise to liability must have occurred during the tax year? Petitioner does not dispute that this “liability” factor is a basic requirement; in fact, it asserts that it is *the* basic requirement. The essential difference between respondent and petitioner relates to the proper interpretation or true meaning of this legal principle.

In the first place, although in stating this requirement it is sometimes said that in order to render a tax accruable in a given year “all of the events must occur in that year which fix the amount and the fact of the taxpayer’s liability” (*Dixie Pine Products Co. v. Commissioner* (1944), 320 U. S. 516, 64 S. Ct. 364, 88 L. Ed. 270), it has never been considered that absolute certainty is necessary as to the amount which may ultimately be *paid*. All that is required is that the amount and fact of the *liability* be established. This is consistent with the general rules in regard to the accrual of contingent liabilities.

Respondent states (Br. 11) that a “contingent” liability will not satisfy the requirement that all of the events giving rise to liability must have occurred during the tax year in which the accrual of the tax is claimed. He does not favor the Court with any discussion of the effect of this proposition as applied to the facts herein. It is apparent, however, that respondent’s conclusion that petitioner’s liability for the franchise tax based on its 1943 net income was contingent on December 31, 1943, is the result of his fundamental error in disregarding the express provisions of the Act imposing liability on that date,

and of his failure to recognize the principle distinguishing between contingencies which go to the existence of liability, and contingencies which affect the amount which may ultimately have to be *paid* on account of the liability. (See *Helvering v. Russian Finance & Construction Co.* (C. C. A. 2, 1935), 77 F. (2d) 234.) None of the cases cited by respondent which relate to the question of contingent liabilities establish any different principles than those stated and discussed in Petitioner's Opening Brief (p. 33 *et seq.*).

A further difference between respondent and petitioner is in determining what *are* "the events" which determine the liability of the taxpayer for the California franchise tax.

It is respondent's position that there is and can be no liability for the franchise tax except as the privilege is exercised "for" which the tax is imposed, and that the doing of business in the "taxable year" is, therefore, "the event" which gives rise to liability. (Br. 12-13.) He repeats this erroneous assertion upon numerous occasions throughout his brief. Manifestly, this proposition is of fundamental importance to respondent's case.

There are two answers to respondent's statement as made at pages 12-13 of his brief. First, it is not true that there would be *no* tax if the taxpayer did no business in 1944. Secondly, the mere fact that subsequent events might make it possible for the taxpayer to obtain an abatement of part *or even all* of the tax for which the statute imposes liability as of the last day of the year on the income on which it is based, does not justify the conclusion that there "is no liability" on the date specified. Each of these answers will be separately considered.

In support of the statement that “if the taxpayer did no business in 1944 there would be no tax,” respondent refers (Br. 13) to page 29 of the Transcript of Record. This is the testimony of one Harry R. Freese, a minor state employee. [R. 21.] The statement of the witness is merely his interpretation of the effect of the Act. [See R. 23.] Furthermore, from a reading of the entire testimony of this witness on the subject, it is evident that he was considerably confused by the questions. [See R. 29-30.] And even if this were not so, the fact would remain that it simply is not the law that a corporation is not required to pay any tax under the Bank and Corporation Franchise Tax Act merely because it does no business during the first fifteen days of the “taxable year.” (See Op. Br. 32-33 and Appendix thereto, 4, 11-12.)

For the Franchise Tax Commissioner’s official interpretation in this regard see Regulation Article 29-1, Paragraph 2, Cal. C.T. Paragraph 8-053. (Op. Br. Appendix, p. 18.) Respondent’s constant repetition of his proposition that there would be no liability if no business done in the taxable year does not change the law.

It should also be noted that in his argument respondent speaks solely in terms of the effect of not doing any “business” in the taxable year. The only provisions in the Act for any abatement or refund, however, relate to a dissolution (of a domestic corporation) or withdrawal (of a foreign corporation). Thus it is clearly not simply a matter of not doing any business. Nor, in fact, is it even a mere matter of dissolving. For if the dissolution does not completely terminate the conduct of the business by *any* corporation under the “control” (80% of stock) of the same stockholders, the tax liability of the dissolved

corporation will be carried over to the successor corporation. (Act, Sec. 13(j) and (k), Op. Br. Appendix 10-11.) Compare Act. Sec. 13(1) (Op. Br. Appendix 12).

Even if it were true, however, that petitioner could have obtained an abatement or refund of the *entire* tax based on its 1943 income *if* it “did no business” in 1944, it would not follow that there was no “liability” on December 31, 1943. Manifestly, there can be an existing “liability” for a tax even though it is one which may never have to be *satisfied* because of events that may occur after the liability has been established. This is a point which was fully developed by petitioner in its Opening Brief (pp. 33-45; see also *Fawcett Machine Company v. United States* (1931), 282 U. S. 375. It is unmistakably provided in the tax statute here in question that liability for the tax *shall* arise (accrue) on the last day of the year on the income of which the tax is based. In other words, under the statute “the events” establishing liability are the earning of net income in the “income year” and the failure to dissolve in the requisite manner by the last day of that year. Manifestly, any contingencies based on subsequent events relate merely to the amount which may have to be *paid* in order to *discharge* the liability and the lien therefor; they have no relation whatsoever to the establishment of “liability” in the first place.

Hence, in order to say that there was no “liability” on December 31, 1943, for the tax based on petitioner’s 1943 net income, it would be necessary to hold that it was beyond the power of the California Legislature to impose statutory liability on that date. Even respondent has not attempted to show that this is true.

Certainly the legislative body which has the power to impose the tax has power to say when liability for such

tax shall arise. The California Legislature has in unmistakable terms identified precisely the time when liability for the California franchise tax arises. The respondent, however, chooses to ignore these explicit provisions in favor of a determination by a reference solely to other provisions of the statute. There is no authority which supports this disregard of the statute imposing the tax liability the accrual of which is in question.

Respondent presents several asserted reasons for disregarding the *lien* in the present case as a factor in identifying the time when liability for the tax arises. First, he suggests (Br. p. 15) that in the *Anderson* case itself the Court ignored a lien because it was “not even worthy of the ‘technical legal’ characterization given to the assessment date in the *Anderson* opinion * * *.” This is refuted, however, by the fact that the Supreme Court itself, in *Magruder v. Supplee* (1942), 316 U. S. 394, recognized the establishment of a lien for a tax as an identification of the time when liability for the tax must have arisen. See also *Crown-Zellerbach Corp.*, 43 B. T. A. 541 at 544. Furthermore, the lien provision referred to by respondent (Br. 15), by its very terms, applies only when a person is liable to pay any tax and neglects and refuses to pay the same *after demand*. In such event, it is provided that the amount shall be a lien *from the time the tax was due* until paid. Manifestly, this would not be such a lien as would have changed the result of the *Anderson* case, for the Court there held that the tax accrued at an *earlier* date than the “due” date. Under this view, the *Anderson* case would be an example of the principle, stated in Petitioner’s Opening Brief (p. 30), that even if the statute contains a lien provision, it is still proper to determine, from a consideration of all of the provisions of the tax statute, that liability arises at an

earlier date than the lien date. See *S. E. Bernheimer*, 41 B. T. A. 249, 252, affirmed by the Circuit Court of Appeals for the Second Circuit, in a *per curiam* opinion, on the authority, in part of the *Anderson* case. (121 F. (2d) 454.)

In the present case, however, respondent would have this Court disregard the lien in favor of a *later* accrual date. There is nothing in the *Anderson* case—or in any other case of which petitioner is aware—which would justify this result.

Respondent also seeks to avoid the effect of the lien provisions of the Franchise Tax Act by asserting that this lien is not valid in any event. (Br. 20.) If the lien imposed by the Franchise Tax Act is invalid because, as respondent suggests (p. 20), it precedes the other steps in assessing and collecting the tax, then all of the tax liens in the State of California are likewise invalid. It is surprising that this has not been discovered before. (Cf. authorities at Op. Br. 26.) Furthermore, the Legislature has removed any doubt as to there being a liability at the date the lien attaches by expressly providing that the tax shall accrue on that day. Manifestly, the Legislature has gone as far as any legislature conceivably could to remove any question as to when it intended liability for the tax to arise. Yet the respondent persists, repeatedly, in asserting that there *wasn't* any liability on the last day of the income year.

Respondent states (Br. 20):

But even if the lien were valid it does not mark the accrual date under federal law because California often imposes liens for taxes before all the events occur which fix the fact and amount of liability—and the latter and not the lien dates, we again emphasize, are the tests of accrual.

But it has never been held that any such lien is for that reason to be disregarded in favor of a later accrual date. (See *Crown-Zellerbach Corp.*, *supra*.) Manifestly, the reason is the universal acceptance of the fundamental principle that where there is a valid lien there must be liability, and when “the events” have occurred which establish liability under the statute then “the events” have occurred to support an accrual of the liability.

Respondent’s discussion at pages 20 to 21 misinterprets the decisions of this Court in *United States v. Sampsell*, *supra*, and *In re Knox-Powell-Stockton*, 100 F. (2d) 979. These cases were correctly cited and analyzed in Petitioner’s Opening Brief (pp. 13 *et seq.*). If the lien is valid so as to be entitled to recognition in a bankruptcy proceeding, there must necessarily have been a “liability” to support it. (*East Bay Municipal Utility District v. Garrison*, 191 Cal. 680, 692-693. See also *Magruder v. Supplee*, 316 U. S. 394, at 397.)

Respondent contends (Br. 18-19) that it would violate Section 43 of the Internal Revenue Code to permit a deduction in 1943 for the tax based on 1943 income as well as on 1942 income. This is not true. As is said in *Dixie Pine Products Co. v. Commissioner* (1944), 320 U. S. 516, at 519,

* * * It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which *really accrues* in the taxable year. (Emphasis added.)

Section 43 of the Internal Revenue Code does not in any way limit this statement. If there are in fact two tax liabilities *imposed* in a single year, the taxpayer is entitled to deduct them both. The Commissioner has in ef-

fect himself recognized this in his rulings in regard to the accrual of franchise taxes imposed by other states. (See I. T. ³⁸⁴⁶~~3151~~, 1947-1 C. B. 17, in effect allowing the deduction of two Tennessee franchise taxes in a single year where there was a change in accrual date as a result of a new *interpretation* of the state law.)

Respondent says (Br. 18-19) that the imposition of liability for two taxes in 1943 is “not to be distinguished from liability for interest or rent for a period of years * * *,” which is within the scope of Section 43. It seems to petitioner that there is a substantial difference between the two situations. Each tax is admittedly a separate tax separately imposed, rather than being a single payment for several years, as in the case of the rent. The situation is more comparable to that which existed when the liability for personal income taxes under the Internal Revenue Code was placed on a current basis. The only difference is that the United States forgave part of the tax upon 1942 income, whereas the State of California did not forgive any tax but put the liability of corporations for franchise taxes on a current basis. The fact that there thus resulted two tax liabilities in one year is clearly not the type of situation covered by Section 43. (See *Security Flour Mills Co. v. Commissioner* (1944), 321 U. S. 281.)

4. Respondent's Argument That "The Tax Court Decisions Do Not Support the Taxpayer."

Under a separate heading captioned "The Tax Court decisions do not support the taxpayer" respondent states (Br. 22):

Counsel's approach to this case in general is to ignore the controlling decisions of the Supreme Court and the Circuit Courts of Appeals, with the exceptions which we have noted and others that have no bearing on the issue. This is perhaps understandable in view of the fact that they could find no support from those quarters. What is surprising is that they rely largely on decisions of the Tax Court.

Petitioner cited and discussed, in what appeared to it to be the appropriate setting, not only the leading Supreme Court cases—*Magruder v. Supplee* and *United States v. Anderson*²—but numerous other decisions. It is believed that the decisions cited and discussed by petitioner will afford an ample basis for a decision herein.

Some of the Board of Tax Appeals decisions cited and discussed by petitioner in its Opening Brief, very clearly were referred to for the sole purpose of showing that they were *not* controlling notwithstanding that they were relied upon by the Tax Court in support of its decision in the present case. (Op. Br. 47-54.) Yet respondent refers (Br. 22-25) to these cases as being cited by and "relied on" by petitioner—and he proceeds to discuss them on this basis. This portion of respondent's discussion is therefore clearly irrelevant, and needs no further answer.

²The Supreme Court decisions in *Security Flour Mills Co. v. Commissioner* (1944), 321 U. S. 281, and *Dixie Pine Products Co. v. Commissioner* (1944), 320 U. S. 516, are also considered under appropriate headings.

Although criticizing petitioner for referring to Tax Court decisions that have become final, respondent deems it important to make the point that “the entire Tax Court is convinced of the correctness of the result” in the present case, even though it is now pending on review. (Br. 22.) It is not apparent how this would remotely support the conclusion reached by respondent, even if it were true—as certainly does not appear from any of the assertions made by respondent in support thereof.

5. The Commissioner’s Administrative Practice.

The respondent asserts (Br. 26) that his ruling in I. T. 3646, 1944-1 C. B. 104, relating to the accrual of the California franchise tax, was “consistent with earlier ones dealing with previous versions of the California tax” and also was “consistent with the treatment accorded other state franchise taxes.” There are two answers to these assertions. First, they are not wholly accurate. Second, they are immaterial in any event.

Respondent’s present interpretation of I. T. 3646 (Br. 16) is that “the tax liability arose monthly at the rate of one-twelfth of the tax measured by 1943 income * * *.” This position is necessitated by his insistence that the provisions of the Act relating to the effect of dissolution during the “taxable year” are conditions precedent to liability, although the Act clearly shows that liability arose on the last day of the income year and that, at most, this liability is subject to partial abatement or refund if the corporation dissolves in the requisite manner during the “taxable year.” This same position was *not* taken in I. T. 3646, however. There, it was ruled that under the 1943 Amendments, the California franchise tax does not accrue on the last day of a

taxpayer corporation's "income year," *but on the first day of the corporation's "taxable year."*

The earlier rulings relating to the accrual of the California franchise tax were also to the effect that the tax accrued on the *first day* after the close of the year on the income of which the tax was based.³ (I. T. 2971, XV-1 C. B. 111 (1934); I. T. 2988, XV-2 C. B. 179 (1936).) This was strictly in conformity with the accrual date as then specified in the California statute. It was only in I. T. 3646 that the Commissioner departed from the accrual date specified in the statute. But he did not even then conclude, as he now contends, that liability for the tax accrued monthly during the taxable year.

Presumably his present abandonment of his earlier position was necessitated by the inconsistency in which it placed him in contending that the liability was contingent on the last day of the income year but was not contingent on the first day of the taxable year. Certainly, if "all of the events" fixing liability have not occurred on December 31, neither have they on January 1. But petitioner is not aware of any decision which has as yet *required* a taxpayer to accrue on a monthly basis. At most, this has been *permitted* when it is in accordance with the regular practice of the taxpayer and usually over the *objection* of the Commissioner. Petitioner, however, has regularly accrued its taxes in accordance with the accrual date specified in the local law.

Also, in regard to the asserted "consistency" of the Commissioner's position herein, or in I. T. 3646, with the treatment accorded other state franchise taxes, it

³The references to "income year" and to "taxable year" have not always been the same. (See Op. Br. p. 4, Note 3.)

should be noted that so far as appears from the rulings themselves the Commissioner has *never* previously been confronted with a statute which contained an express accrual and lien provision which he disregarded in favor of a later accrual date. Manifestly, neither the earlier rulings on the California franchise tax nor the rulings on other state franchise taxes, even if constituting “authority,” establish any precedent which fits the situation under the 1943 amendments to the California Franchise Tax Act. (See Op. Br. 23.)

Secondly, however, it is elementary that rulings of the Commissioner are not “authority” no matter how consistent they may be. (*Cole v. Commissioner* (C. C. A. 9, 1934), 81 F. (2d) 485, 487-8.)

As a part of his discussion of the discretionary powers of the Commissioner with respect to accrual, respondent states that petitioner’s accrual in 1943 of the tax based on 1943 income does not “properly reflect” income. Respondent says (Br. 27-8):

* * * Section 41 delegates to the Commissioner unusual authority to determine when an item is properly accruable. The standard is proper reflection of income “in the opinion of the Commissioner.” The exercise of this discretion is only reviewable when it is clearly abused.

But no case to which respondent refers, and none of which petitioner is aware, holds that the Commissioner is vested with discretion to disregard the express provisions of a state tax statute as to when liability shall accrue and a lien attach, in favor of a later accrual date. If the statutory provisions are not controlling, then it is not necessary for the Commissioner to rely on any “discretion” vested in him. If the statutory provisions are controlling,

then a disregard thereof is a clear abuse of the discretion that is vested in the Commissioner. The provisions of section 41 clearly were not intended to authorize the Commissioner to change the year in which an item *really accrues*. (Cf. *Security Flour Mills Co. v. Commissioner*, *supra*. And see *Dixie Pine Products Co. v. Commissioner*, 320 U. S. 516, 519.)

6. Respondent's Discussion of "The Property Tax Cases."

Respondent states (Br. 29) that:

The taxpayer places substantial, if not, principal reliance on the alleged rule that real property taxes are accrued on the lien date.

What petitioner in fact stated was that the controlling principle is that taxes "accrue" for Federal income tax purposes in the Federal taxable year in which falls the date on which personal liability for the tax arises *or* in which a lien therefor attaches, whichever is earlier. It was in support of these statements that petitioner cited *Magruder v. Supplee* (1942), 316 U. S. 394, *supra*; *California Sanitary Co., Ltd.* (1935), 35 B. T. A. 122, and *Crown-Zellerbach Corp.* (1941), 43 B. T. A. 541, *supra*.

Respondent seeks to distinguish the first two of these cases upon the ground that they involved only the question of "who is the taxpayer, not when does the tax accrue." (Br. 29.) It would seem elementary that if it has been determined, as in the cited cases, that there was a tax charge upon property at the lien date, for purposes of ascertaining who is entitled to a tax deduction for a payment of the tax—*i.e.*, the person who owned the property on the lien date or the person who subsequently purchased the property—it must necessarily have been determined that there was *a tax liability* on the lien date.

Otherwise, it is not apparent how there could be any tax which can be said to be the liability of the owner as of that date.

Even if there were any room for doubt upon this as a matter of abstract reason, however, it is completely answered by a careful reading of the opinion in the *Supplee* case. See, also, *Lifson v. Commissioner* (C. C. A. 8, 1938), 98 F. (2d) 508, so interpreting the *Supplee* case.

The cases cited by respondent (Br. 29-30)⁴ are not in point. Their distinction of the *Supplee* case is, at most, applicable where the taxpayer has regularly employed the monthly accrual method in keeping its books. Certainly, a decision that a taxpayer *may* accrue taxes monthly does not support the conclusion that all taxpayers are *required* to accrue taxes monthly. See *Atlantic Coast Line R. Co.*, 4 T. C. 140; and compare *Budd International Corp.*, 45 B. T. A. 737, reversed on other grounds, C. C. A. 3, 1944, 143 F. (2d) 784. In the present case, the uniform practice of the petitioner was to accrue liability for the franchise tax on the single lien and accrual date specified in the tax statute.

The respondent states (Br. 30) that *Crown-Zellerbach Corp.*, *supra*, reached a result contrary to that reached in the *Atlanta Stove Works*, and *Schock, Gusmer & Co.* cases. Petitioner does not agree. The decisions cited by respondent merely state an exception to the general rule which is correctly stated and applied in the *Crown-Zellerbach* case, which *exception* is wholly inapplicable in the present case.

⁴*Allen v. Atlanta Stove Works* (C. C. A. 5, 1943), 138 F. (2d) 452, and *Commissioner v. Schock, Gusmer & Co.* (C. C. A. 3, 1943), 137 F. (2d) 750.

Nor is *Crown-Zellerbach* “repudiated,” as respondent suggests (Br. 30) by the decision in *S. E. and M. E. Bernheimer Co.*, *supra*. As has previously been noted, the *Bernheimer* case merely holds that a tax *may* accrue *prior* to the lien date if the other provisions of the tax statute show that liability in fact arose at such earlier date. However, that case is no authority whatsoever for the proposition—contended for herein by the respondent—that the Commissioner may require the accrual of a tax at a date *later* than the date specified in the tax statute for the accrual of liability for the tax and for the attaching of a lien. As a matter of fact, in affirming, *per curiam*, the *Bernheimer* case, *supra*, the Circuit Court of Appeals for the Second Circuit does so on the authority, in part, of *United States v. Anderson*, *supra*. Apparently, then, that Court didn’t think there was a different rule for property taxes than for income taxes.

As a final ground for distinguishing the property tax cases—holding that taxes accrue when there is personal liability or a lien therefor, whichever is earlier—respondent asserts (Br. 30-31) that these cases are not controlling because, according to the Supreme Court in the *Supplee* case, it is misleading to speak of real estate taxes as “applicable” to the fractional part of a tax year, whereas “the California franchise tax is expressly imposed for the privilege of doing business year by year and even month by month.” In other words, respondent in effect contends that the cases involving property taxes are *per se* inapplicable. There are several answers to this contention.

In the first place, respondent himself has not consistently considered the principles of cases involving the accrual of property taxes to be *per se* inapplicable in determining the proper time of accrual of the tax involved herein. On the contrary, he cites numerous property tax cases as being

“direct authority against taxpayer’s position” herein. (Br. 12.) Secondly, the dictum in the *Supplee* case which respondent quotes (Br. 30) in regard to property taxes not being “applicable” to the fractional part of a tax period is disapproved in the decision in *Commissioner v. Schock, Gusmer & Co., supra*, cited by respondent. As that case points out, annually recurring property taxes are a very real part of the continuing overhead expense of a business. In this they are not essentially different from a franchise tax. In any event, however, as is more fully developed elsewhere herein, the California franchise tax is, from the standpoint of the taxpayer, a payment for the privilege of doing business in the taxable year in a “technical legal sense” only. In a substantial and economic sense it is a charge upon the income which is the basis for the tax. The purported distinction of property tax cases upon the ground that the tax in the present case is for the privilege of doing business “year by year and even month by month” is without merit. So are property taxes a part of the overhead cost of doing business year by year and even month by month.

Also, in support of his contention that the “property tax cases” are inapplicable herein, respondent says that “When a lien attaches for realty taxes a liability exists and the tax cannot be defeated.” (Br. 31.) This is not wholly true. If, as in California, the lien attaches prior to any of the other proceedings for the assessment or collection of the tax, there is considerably less certainty in regard to both the existence and amount of the liability than there was in regard to both the existence and amount of petitioner’s liability on December 31, 1943, for the franchise tax based on its 1943 income. If the lien precedes the other steps in the assessment and collection of the tax, there is no certainty at all as to the amount of

the property taxes. The levy may be large or small, or, as is judicially recognized in *Allen v. Atlanta Stove Works, supra*, may be omitted entirely. Or certain property may subsequently be freed of any liability for the tax. This has actually occurred in California, even though here it was necessary to amend the State Constitution to do so. (See Calif. Const., Art. XIII, Sec. 8a.) In states which do not have a constitutional prohibition against gifts of public funds, such as was deemed to require the above-mentioned constitutional amendment in California, the property tax could be abated, and the lien thus removed, by simple legislative action. (See Op. Br. 33 *et seq.*)

Manifestly, the fact that there are many contingencies which may affect the amount which may ultimately have to be paid on the tax does not justify the conclusion that there *isn't* "liability" until all of those contingencies have been eliminated. The imposition of a statutory lien for *any* tax, whether property tax or franchise tax or other tax, as of a specified date, is simply one way for the legislative body to say to the taxpayer, Now and henceforth you *are liable*, even though the amount you will be required to pay on this liability may be reduced or even entirely abated by certain subsequent events.

7. Respondent's Consideration of the Accrual and Lien Provisions of the California Franchise Tax Act.

Having devoted the principal portion of his brief to a discussion of what he considers to be the established rules of when to accrue a liability for Federal tax purposes, in complete disregard of the accrual and lien provisions of the California Franchise Tax Act, respondent, after a very brief discussion, brushes aside these provisions of

the local law as being not controlling for Federal tax purposes. (Resp. Br. 31-34.) He attempts to justify this upon the ground that Federal revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation, uniform in its application. (Br. 31.) In support of this proposition he cites (Br. 32) various cases which do not involve the accrual of liability for taxes imposed by local law. Their inapplicability is so self-evident as not to warrant any separate discussion of them.⁵

As pointed out in Petitioner's Opening Brief (p. 21) it is expressly declared by Randolph Paul in his *Selected Studies in Federal Taxation*, Second Series, page 23, that the Federal statute does, by "necessary implication," make the state law controlling in regard to when a tax is accrued as well as in regard to what is a state tax and who is liable. The Supreme Court of the United States, in *Magruder v. Supplee*, *supra*, cited this statement by Paul in support of the proposition that "Resort must be had here to the laws of Maryland and the city of Baltimore to determine upon whom the state and city real estate taxes were imposed." (316 U. S. 394, at 396.)

Respondent apparently is conscious, however, of the importance to his case of disregarding completely the ex-

⁵*Estate of Putnam v. Commissioner*, 312 U. S. 399, cited by respondent (Br. p. 32), involved the word "accrued" as used in Section 42. Even the most cursory examination of the decisions applying Section 42 will satisfy that the word "accrued," as used in that section, has a special meaning vastly different from the general definition of "accrued" in Section 48, and that the nature of the mischief which Congress sought to remedy when in 1934 it added the last sentence of Section 42, required that the meaning of "accrued"—"in this section," as the Court was careful to say—be uniform. See *Helvering v. Enright's Estate*, 312 U. S. 636, for a statement of the purpose of Congress in the 1934 amendment to Section 42.

press provisions of the local law as to when liability arises and the lien attaches. It is evident that it is only upon this basic assumption, upon which substantially his entire argument rests, that he can possibly reach the conclusions stated in the earlier portions of his brief.

Respondent refers to *George S. Colton Elastic Web Co. v. United States*, 116 F. (2d) 202, in support of the proposition that state law is not controlling in regard to the time of accrual of local taxes. That case did at least involve the question of the accrual of a state tax. However, the state statute there involved was not clear in specifying whether the excise tax thereby imposed was a "single tax" made up of the sum of two factors, one applied to income and the other to "corporate excess," or whether it imposed a separate tax with respect to each factor. The Supreme Judicial Court of Massachusetts had interpreted the statute as providing for a single tax, in upholding the constitutionality thereof. The Circuit Court of Appeals in the cited case, however, determined the accrual date of the tax for Federal income tax purposes in accordance with its own interpretation of the state statute. It did this, not because it considered the local law to be ineffective, but because it considered that the time of accrual of liability under the local law was not to be determined according to the characterization of the statute for purposes of determining its constitutionality. It is clear that even the court which decided the cited case would not have disregarded a clear and unequivocal provision in the local statute identifying the time when liability for the tax arises and the lien attaches.

In declining to follow the characterization, by the Massachusetts Supreme Judicial Court, of the tax as a single

excise tax, the Circuit Court of Appeals stated (116 F. (2d) at 204):

We do not think this language is determinative of the issue in the case at bar. Certainly the characterization of the excise as “single”, apparently directed to the question of constitutionality, is not conclusive upon us in determining how the Massachusetts tax is to be treated for federal income tax purposes. However, as an interpretation of the Massachusetts statute involved, and as an indication of the liabilities of corporate taxpayers under that act, the Springdale decision is of course binding upon us.

The case thus in reality is in support of petitioner’s contention herein that the technical characteristics which support the tax from a constitutional standpoint are not necessarily controlling in determining when a tax “accrues.”

8. Respondent’s Discussion of the “Dobson” Principle.

Petitioner believes that it is clear that the Tax Court erred. Further, this error is in its failure to apply the correct rule of law. It failed to determine the accrual in accordance with the express provisions of the Franchise Tax Act. It admittedly and deliberately disregarded the express provisions of the Act relating to the time “liability” arose and a lien therefor attached. It applied erroneous principles of law, and misinterpreted the principles established in the *Anderson* case and in the *Supplee* case relating to the time of accrual of liability for taxes. Clearly, the *Dobson*⁶ principle has no application under such circumstances. (See Op. Br. 10-12.)

Nor do the cases cited by respondent support its ap-

⁶*Dobson v. Commissioner* (1943), 320 U. S. 489.

plication here. The *Security Flour Mills* case, *supra*, squarely holds, and the *Dixie Pine Co.* case, *supra*, recognizes, that if the Tax Court applies an *incorrect rule of law* in determining that an item is not deductible on the accrual basis, the decision is *not* entitled to the finality indicated by the *Dobson* case. In fact, in the *Security Mills* case both the Circuit Court of Appeals and the Supreme Court reached a different result from that reached by the Tax Court decision therein.

Nor does the doctrine in regard to deductions being a matter of grace, referred to by respondent (Br. 34), entitle the Tax Court to deny deductions according to erroneous principles. Here there is no question as to the right to a deduction. The only question is as to the proper year in which to take the deduction on the accrual basis.

The recent decisions of this court in *Seattle Brewing & Malting Co. v. Commissioner*, F. (2d), and *Commissioner v. Rainier Brewing Co.*, F. (2d), both decided on January 8, 1948 (see 1948 Prentice-Hall Federal Tax Service, Paragraphs 72,315 and 72--316), were clearly fact cases. This is emphasized by the opinions rendered in denying a rehearing, on February 18, 1948. (See 1948 P.H. Fed. Tax Serv., Paragraphs 72,-372 and 72,373.)

Another interesting fact in regard to these recent decisions by this Court is that they utilize exactly the same tests with respect to the applicability or inapplicability of the *Dobson* case, regardless of whether it is the taxpayer or the government that is seeking the review of the Tax Court decision. They thus provide a complete answer, if any be needed, to the Commissioner's implication (Br. 34) that although the *Dobson* principle must be applied against the taxpayer, it would not have been

available to support the decision if the Tax Court had held in favor of the taxpayer.

Finally, respondent's *Dobson* argument overlooks the fact that it was he who appealed from the decisions of the Tax Court in the *Security Mills* and *Le Roy*⁶ cases. In the former case the Tax Court was reversed; in the latter it was affirmed.

Conclusion.

The petition for review should therefore be granted, and the decision of the Tax Court reversed and the case remanded to the Tax Court with instructions to enter judgment for the petitioner consistent with Section 322(d) of the Internal Revenue Code. See pages 7 and 8 of Petitioner's Opening Brief.

Respectfully submitted,

JOSEPH D. BRADY,
JOHN O. PAULSTON,
c/o Brady & Nossaman,
433 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Los Angeles, California, March 17, 1948.

⁶*Commissioner v. Le Roy* (C. C. A. 2, 1945), 152 F. (2d) 936.

No. 11797

United States
Circuit Court of Appeals
For the Ninth Circuit.

STATE OF CALIFORNIA,
vs.
UNITED STATES OF AMERICA,
Appellant,
Appellee.

STATE OF CALIFORNIA,
vs.
UNITED STATES OF AMERICA,
Appellant,
Appellee.

STATE OF CALIFORNIA,
vs.
UNITED STATES OF AMERICA,
Appellant,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
35-134
PAUL P. O'BRIEN, CLERK

No. 11797

United States
Circuit Court of Appeals
For the Ninth Circuit.

STATE OF CALIFORNIA,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

STATE OF CALIFORNIA,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

STATE OF CALIFORNIA,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Amended Answer of Defendant, State of California: | |
| D. C. No. 22147..... | 20 |
| Exhibit A—Resolution..... | 18 |
| 22261..... | 90 |
| Exhibit A—Resolution..... | 85 |
| 22416..... | 137 |
| Exhibit A—Resolution..... | 135 |
| Amendment to Complaint..... | 87 |
| Answer of Defendant, State of California: | |
| D. C. No. 22147..... | 8 |
| 22261..... | 75 |
| 22416..... | 126 |
| Appeal: | |
| Bond for Costs on: | |
| D. C. No. 22147..... | 51 |
| 22261..... | 110 |
| 22416..... | 156 |
| Certificate of Clerk to Transcript of Record on | 163 |
| Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on..... | 62 |

| INDEX | PAGE |
|---|------|
| Appeal—(Continued): | |
| Notice of: | |
| D. C. No. 22147..... | 50 |
| 22261..... | 110 |
| 22416..... | 155 |
| Order Consolidating Causes on..... | 58 |
| Order Permitting the Consideration of the Original Papers and Exhibits Certified to the Circuit Court with Like Effect as if Printed in the Record on..... | 271 |
| Statement of Points on Which Appellant Intends to Rely on: | |
| D. C. No. 22147..... | 59 |
| 22261..... | 115 |
| 22416..... | 160 |
| Bond for Costs on Appeal: | |
| D. C. No. 22147..... | 51 |
| 22261..... | 110 |
| 22416..... | 156 |
| Certificate of Clerk to Transcript of Record on Appeal | 163 |
| Complaint in Condemnation: | |
| D. C. No. 22147..... | 2 |
| 22261..... | 66 |
| 22416..... | 117 |
| Designation of the Portions of the Record, Pro- ceedings and Evidence to be Contained in the Record on Appeal..... | 62 |

| INDEX | PAGE |
|--|------|
| Final Judgment as to Parcels 3-A and 3-B.... | 47 |
| Findings of Fact and Conclusions of Law: | |
| D. C. No. 22147..... | 40 |
| Conclusions of Law..... | 46 |
| 22261..... | 100 |
| Conclusions of Law..... | 105 |
| 22416..... | 146 |
| Conclusions of Law..... | 151 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal: | |
| D. C. No. 22147..... | 50 |
| 22261..... | 110 |
| 22416..... | 155 |
| Order Consolidating Causes on Appeal..... | 58 |
| Order for Immediate Possession: | |
| D. C. No. 22261..... | 72 |
| 22416..... | 123 |
| Order for Transmission of Exhibits to the United States Circuit Court of Appeals: | |
| D. C. No. 22147..... | 54 |
| 22261..... | 113 |
| 22416..... | 158 |
| Order Permitting the Consideration of the Original Papers and Exhibits Certified to the Circuit Court with Like Effect as if Printed in the Record on Appeal..... | 271 |
| Preliminary Judgment as to Parcel 2: | |
| D. C. No. 22261..... | 107 |
| 22416..... | 152 |

| INDEX | PAGE |
|--|----------|
| Reporter's Transcript..... | 165 |
| Witnesses for Defendants: | |
| George, Harold E. | |
| —direct | 186, 229 |
| —cross | 201, 233 |
| Field, E. B. | |
| —direct | 205 |
| —cross | 210 |
| —redirect | 220 |
| —recross | 223 |
| Wall, A. P. | |
| —direct | 224 |
| Witnesses for Plaintiff: | |
| Phillips, Joseph J. | |
| —direct | 243 |
| —cross | 251 |
| Thomas, George H., Jr. | |
| —direct | 258 |
| —cross | 263 |
| —redirect | 265, 269 |
| —recross | 266 |
| Statement of Points on Which Appellant Intends to Rely on Appeal: | |
| D. C. No. 22147..... | 59 |
| 22261..... | 115 |
| 22416..... | 160 |
| Stipulation and Agreement for Consolidation. | 55 |
| Stipulation as to Market Places..... | 31 |
| Stipulation Entered into at the Trial of the Above Captioned Case..... | 34 |

NAMES AND ADDRESSES OF ATTORNEYS

FRED N. HOWSER,

Attorney General of the State of California.

HAROLD B. HAAS,

Deputy Attorney General.

MIRIAM E. WOLFF,

Deputy Attorney General.

600 State Building,

San Francisco, California.

Attorneys for Defendant and

Appellant, State of California.

M. MITCHELL BOURQUIN,

Special Assistant to the Attorney General,

710 Crocker Building,

620 Market Street,

San Francisco, California,

Attorney for Plaintiff and Appellee.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 22147-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

230.5 ACRES OF LAND in the City and County of
San Francisco, State of California, CARRIE F.
REDNALL, et al.,

Defendants.

COMPLAINT IN CONDEMNATION

Now comes the United States of America, by M. Mitchell Bourquin, Special Assistant to the Attorney General, at the direction and under the authority of the Attorney General of the United States and pursuant to the request of the Acting Secretary of the Navy, and for cause of action against the above-named defendants, alleges as follows:

I.

That this proceeding is instituted and the lands hereinafter described are taken pursuant to the provisions contained in the Act of Congress approved July 19, 1940 (Public Law No. 757, 76th Congress, 3rd Session), which Act authorizes the acquisition of land for naval purposes, and the Second War Powers Act of 1942 (S. 2208, 77th Congress, 2nd Session).

II.

That the lands hereinafter described are taken and condemned under the authority of the above-mentioned Act of Congress, for the uses and purposes authorized by said act and are sought and taken for the expansion of facilities at the present Naval Dry Docks Hunters Point, San Francisco, California, and are suitable and necessary for said purpose; that said use of said lands constitutes a public use and said lands have been selected by the Secretary of the Navy for the acquisition for said purposes and uses above stated and are required for immediate use in order that the necessary work may be begun thereon for carrying out said purposes and uses.

III.

That the acquisition of said lands by plaintiff will be of the greatest public benefit and the least private injury; that no part of said lands has heretofore been appropriated for public use by said plaintiff, or the State of California, or any political subdivision thereof.

IV.

That the estate or interest which plaintiff seeks to take and condemn in the lands hereinafter described is the fee simple title to said lands, hereinafter described. [4*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That there are sufficient funds now available with which plaintiff can and is authorized to pay just compensation for the lands sought to be taken and condemned herein in whatever sum may be ultimately awarded in this proceeding for the taking of said lands and any damages resulting therefrom.

VI.

That the lands to be taken and condemned in this proceeding aggregate 230.5 acres, more or less are situate in the City and County of San Francisco, State of California, and more particularly described as follows:

Beginning at the point of intersection of the northeasterly line of Oakdale Ave. and the southeasterly line of Fitch Street, said point also being the northwesterly corner of Block 4725 as shown on that certain map entitled "Naval Dry Docks, Hunters Point, California, Acquisition of Land," Numbered C-1892-5 and prepared by the Public Works Administration and from said point of beginning southeasterly along the northeasterly line of Oakdale Ave. and the projection thereof to a point which is the point of intersection of the line projected from the northeasterly line of Oakdale Ave. and the United States Bulkhead Line; thence in a northeasterly direction along said United States Bulkhead Line to a point which is the point of intersection of the United States Bulkhead Line and the southwesterly boundary line of the Hunters

Point Naval Dry Docks; thence northwesterly along said southwest boundary line to a point which is the most westerly corner of the lands of said Hunters Point Naval Dry Docks; thence northeasterly along the northwesterly boundary line of Hunters Point Naval Dry Docks to a point which is the point of intersection of said northwesterly boundary line and the United States Bulkhead Line; thence along said United States Bulkhead Line to a point which is the point of intersection of said United States Bulkhead Line and the southeasterly line of Coleman Street; thence southwesterly along the southeasterly line of said Coleman Street to a point which is the [5] point of intersection of said southeasterly line of Coleman Street and the southwesterly line of McKinnon Ave.; thence northwesterly along the southwesterly line of McKinnon Ave. to a point which is the point of intersection of the southwesterly line of McKinnon Ave. and the southeasterly line of Earl Street; thence southwesterly on the southeasterly line of Earl Street to a point which is the point of intersection of said southeasterly line of Earl Street and the southwesterly line of Newcomb Ave.; thence northwesterly on the southwesterly line of Newcomb Ave. to a point which is the point of intersection of the southwesterly line of Newcomb Ave. and the southeasterly line of Fitch Street; thence southwesterly along the southeasterly line of Fitch Street to a point which is the point of intersection of the southeasterly line of Fitch Street and the northeasterly line of Oakdale Ave., said point being the point of beginning, containing 230.5 acres, more or less.

VII.

That a plan showing the lands taken as above described is attached hereto, marked Exhibit "A," and made a part hereof by reference.

VIII.

That plaintiff is informed and believes and therefore alleges that none of said lands taken by this proceeding are a part of any larger tract belonging to the apparent owners of said lands herein described.

IX.

Each of the defendants above named claims to be the owner of a portion of the property subject of this action, or has or claims to have some interest therein.

X.

That so far as is known to plaintiff, the only persons, firms or corporations having or claiming any interest in the above-described property, and who are therefore joined as defendants, are the following: City and County of San Francisco, and State of California. [6]

XI.

That the defendants Second Doe to Twenty-fifth Doe, inclusive, and First Doe Corporation to Twentieth Doe Corporation, inclusive, are sued and designated herein by fictitious names for the reason that their true names are unknown to plaintiff, but the plaintiff will, upon ascertaining their true

names, substitute the same for such fictitious names by appropriate amendment, and prays such leave of the Court; that said defendants, and each of them, may have or claim to have an interest in some piece or parcel of the lands sought to be taken and condemned in this action, but that the nature, character or extent of such interest is unknown to plaintiff.

XII.

That the Acting Secretary of the Navy has determined that it is necessary, advantageous and in the interest of the United States that an order be obtained from this Court authorizing said Navy Department to take immediate possession of the above-described lands to the extent of the interest above-described, and the above-mentioned Special Assistant to the Attorney General has been authorized and directed by the Attorney General of the United States to take proper proceedings herein to acquire such order from this Honorable Court.

Wherefore, plaintiff prays:

1. For an order authorizing and directing the United States to take immediate possession of the above-described lands.

2. For judgment:

- (a) Decreeing that said lands above described, to the extent of the title and interest which plaintiff seeks to acquire by this action, are condemned for necessary public uses of the plaintiff as authorized by law; that all of said lands are necessary and suitable thereto;

(b) Determining the value of the lands subject of this action and each separate interest therein and directing the payment for each separate interest to the persons entitled thereto.

3. For such other and further relief as the Court may deem meet and proper in the premises.

M. MITCHELL BOURQUIN,
Special Assistant to the
Attorney General. [7]

(Verification.)

[Endorsed]: Filed Apr. 4, 1942. [8]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, STATE OF
CALIFORNIA

Comes now the defendant, State of California, one of the defendants in the above action, and for answer to plaintiff's complaint herein, affirms, denies and alleges as follows:

I.

Denies the allegations contained in paragraph I of plaintiff's complaint herein.

II.

Denies the allegations contained in paragraph II of plaintiff's complaint herein, and in this connection alleges:

That it is not necessary, for the purposes mentioned in said paragraph II, to acquire the subsurface estate, consisting of the mineral and mineral rights, in and to the property condemned herein; that the acts referred to in said paragraphs I and II of the complaint herein do not authorize the condemnation or taking of minerals and mineral rights in property where such taking or condemnation is not essential to the uses and purposes for which the property is condemned.

That Section 6401 of the Public Resources Code of the State of California provides that in the disposal of all tide and submerged lands, belonging to the State of California, there be reserved to the State the mineral deposits and mineral rights in lands authorized to be sold.

That on November 4, 1943, the State Lands Commission adopted a resolution requiring that reservation to the State be made of all deposits of minerals and mineral rights. A certified copy of said resolution is attached hereto and made a part hereof and for reference is marked Exhibit "A."

III.

Denies the allegations of Paragraph III of plaintiff's complaint herein. [9]

IV.

Admits as alleged in paragraph IV that the estate or interest which plaintiff seeks to condemn in the lands described in the complaint is the fee simple title thereto but in this connection this defendant

alleges that such estate or interest is not necessary for the purposes mentioned in paragraphs I and II of the complaint; that it is not necessary to condemn the minerals and mineral rights in said described lands.

V.

Respecting the allegations in paragraph V of plaintiff's complaint herein, defendant, State of California, has no information or belief upon the subject and, placing its denial upon said ground, denies the allegations therein contained.

VI.

Admits the allegations of paragraph VI of plaintiff's complaint herein.

VII.

Admits that the defendant, State of California, has and claims an interest in the property subject to suit, as alleged in paragraph X of plaintiff's complaint herein, and in this connection alleges:

That prior to September 9, 1850, a portion of the lands subject to this action were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date California was admitted into the and became a member of the Union of States upon an equal footing with the original States, in all respects, and thereupon and by that fact acquired title to all such tide and submerged lands. That thereafter, and on June 20, 1863, the defendant, State of California, acting through its

Governor, Leland Stanford, conveyed by patent to the South San Francisco Homestead and Railroad Association certain of the said tide and submerged lands; that said patent is hereinafter, for convenience, referred to as the "Stanford" patent. That thereafter, and on March 30, 1868, the Legislature of the State of California enacted "An Act to Survey and Dispose of Certain Salt Marsh and Tide [10] Lands Belonging to the State of California." That said Act created a Board of Tide Land Commissioners and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide. That after the completion of such preliminary survey, the said Board was directed to establish the Water Line Front of San Francisco, and cause all the property belonging to the State lying South of Second Street within the City and County to be surveyed into lots and blocks with reservations of so much thereof for streets, docks, piers, slips, canals, drains or other uses necessary for the public convenience and purposes of commerce as the said Board deemed required. That the said Act further authorized and directed the said Board to prepare maps of the area as re-surveyed, and to cause the lots as so established to be sold at public auction. That pursuant to said Act the said Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which Map

was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869. That the said "Stanford" patent, hereinbefore referred to, granted to the said South San Francisco Homestead and Railroad Association certain swamp and overflow, tide and submerged lands in addition to the Bayward of the lands delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" as the property of the said South San Francisco Homestead and Railroad Association. That the said survey established, within 24 feet of water at the lowest stage of the tide, the Water Line Front; which said Water Line Front coincided with the easterly line of Water Front Street, as delineated on said Map. That in and by said survey, there were further laid out, established, reserved and dedicated certain Basins, among which is that area known as Dry Dock Basin. That there were also laid out and established by said survey blocks and lots surrounded by areas delineated upon the said Map as Streets and Avenues. That said Map contains a certification that said Map correctly exhibits the Water Line Front of the City and County [11] of San Francisco, together with reservations for streets, docks, piers, slips, canals, basins and other uses necessary for public convenience and purposes of commerce. That none of the lands lying within the said Dry Dock Basin has ever been conveyed by the State of California; that none of the lands lying outside the line of the "Stanford" patent to the South San Francisco, Homestead and Railroad Association and within the areas designated as

Streets and Avenues upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" has ever been conveyed or dedicated by the State of California, by the State Board of Tide Land Commissioner, or by any municipal corporation, pursuant to authority of the defendant, State of California, or otherwise. That about the year 1890 the Harbor Line Board of the United States Engineers established the present United States Bulkhead Line; that said Bulkhead Line lies Bayward of said Water Line Front and easterly line of Water Front Street. That none of the said tide and submerged land situated between the said Water Line Front and easterly line of Water Front Street and the said United States Bulkhead Line has ever been conveyed by the State of California.

That the description in plaintiff's complaint herein embraces the following lands:

(1) That area known and designated as Dry Dock Basin;

(2) The Lands Lying Bayward of Water Line Front and the easterly line of Water Front Street and situated between such line and the United States Bulkhead Line;

(3) The lands lying outside the line of the "Stanford" patent and delineated upon the "Map of Salt Marsh and Tide Lands and lands Lying Under Water" as Streets and Avenues.

That the defendant, State of California, is the owner of and was, at the time of the filing of the complaint herein, entitled to the possession of such lands.

That the lands above referred to are hereinafter referred to as parcels #1, #2, #3A and #3B. [12]

That the said Parcel #1 contains all of the area comprising Dry Dock Basin, together with the land lying Bayward of the Water Line Front and easterly line of Water Front Street and situate between such Water Line Front and the United States Bulkhead Line; that said area is more particularly described as follows:

Commencing at the intersection of the northeasterly extension of the southeasterly line of Coleman Street and the United States Bulkhead Line; thence along said United States Bulkhead Line southeasterly to the northwesterly line of the Hunters Point Naval Dry Docks; thence southwesterly along said northwesterly line to the "Stanford" patent line; thence westerly along said "Stanford" patent line to the southeasterly line of China Street; thence northeasterly along the southeasterly line of China Street to the easterly line of Water Front Street; thence northerly along the easterly line of Water Front Street to said northeasterly extension of the southeasterly line of Coleman Street; thence northeasterly along said northeasterly extension to the point of commencement, containing 7.84 acres, more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #1 is \$7000.02.

That Parcel #2 contains that area lying Bayward of the line of the Water Line Front and easterly line of Water Front Street and situate between

such Water Line Front and the United States Bulkhead Line, and is more particularly described as follows:

Commencing at the intersection of the United States Bulkhead Line and the southwesterly boundary line of the Hunters Point Naval Dry Docks; thence southerly along said United States Bulkhead Line to the southeasterly extension of the northeasterly line of Oakdale Avenue; thence northwesterly along said line of Oakdale Avenue to the easterly line of Water Front Street; thence in a general northerly direction along the easterly line of Water Front Street, being the Water Line Front, to the southwesterly boundary line of the Hunters Point Naval Dry Docks; thence along said line of the Hunters Point Naval Dry Docks southeasterly to the point of commencement containing [13] 12.72 acres, more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #2 is \$13,357.18.

That Parcel #3A contains that area shown on the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association, and delineated upon said Map as Streets and Avenues, and is more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the west by the southeasterly line of Coleman Street, on the north and east by the Water Line Front and on the south by the "Stanford" patent line, containing 6.85 acres, more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #3A is \$6116.10.

That Parcel #3B contains that area shown on the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association, delineated upon said Map as streets and avenues, and is more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the east by the Water Line Front, on the south by the northeasterly line of Oakdale Avenue, on the west by the "Stanford" patent line, and on the north by the southwesterly line of the Hunter's Point Naval Dry Docks, containing 28.13 acres, more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #3B is \$25,116.15.

That a copy of the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" is attached hereto, marked Exhibit "B," and made a part hereof by reference. That the said Exhibit "B" shows the line of the "Stanford" patent, hereinbefore referred to, and shows, delineated in red, the areas owned by the defendant, State of California.

Wherefore, said defendant, State of California, prays: [14]

(1) That the Court assess the sum of \$49,589.44 and award the same to the defendant, State of Cali-

fornia, as compensation for the taking of its interest, exclusive of minerals and mineral rights in the said premises, in the land subject to this suit;

(2) That the Court adjudge the defendant, State of California, the owner of the sub-surface estate in the minerals and mineral rights;

(3) That the Order granting immediate possession and use of the lands herein, heretofore made on the 4th day of April, 1942, to such extent; be modified;

(4) That the Court grant such other and further relief as may be meet and proper in the premises.

ROBERT W. KENNY,
Attorney General,
State of California.

By NIEL CUNNINGHAM,
JOHN F. HASSLER, JR.,
Deputies Attorney General.

Dated December 6, 1943, San Francisco.

(Acknowledgment of receipt of copy.) [15]

No. 1017

Division of State Lands
State Lands Commission, State of California
Los Angeles

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify that the annexed document is a true and correct copy of a Resolution adopted by the State Lands Commis-

sion on November 4, 1943, on file in the office of the State Lands Commission; that said copy has been compared by the undersigned with the original, and is a correct transcript therefrom.

In Witness Whereof, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 19th day of November, A.D. 1943.

[Seal]

CARLILE F. LYNTON,
Executive Officer,
State Lands Commission.

[Endorsed]: Filed Dec. 6, 1943. [16]

EXHIBIT "A"

RESOLUTION

Whereas, The Sovereign State of California has in many instances in the Past conveyed by grant, deed or under court decree lands belonging to the Sovereign State of California and,

Whereas, the Sovereign State of California has failed in most instances to reserve to the Sovereign State of California, the mineral which might have been contained in such conveyed lands, and,

Whereas, the people of the Sovereign State of California have been deprived of revenue which might have accrued to their benefit had such minerals been reserved, and,

Whereas, Section 6401 of the Public Resources Code of the State of California specifically pro-

vides for a reservation to the Sovereign State of California of all mineral deposit in lands belonging to the State of California,

Now, Therefore, be it resolved, that the State Lands Commission does hereby record itself as being opposed to any further conveyance of State Lands to the Federal Government without insisting upon reserving to the State of California, the minerals which might be contained therein, and

Be It Further Resolved, that the Executive Officer of the State Lands Commission be instructed to present to the Honorable Robert W. Kenny, Attorney General of the State of California, a copy of this resolution, together with a request that the Attorney General's office from this date henceforth shall demand reservation to the Sovereign State of California of all deposits of coal, phosphate, sodium, gold, silver, oil, gas, oil shale, or other hydrocarbons and all other mineral deposits which might be contained within any State Lands which the Federal Government seeks to condemn or otherwise acquire.

November 4, 1943.

STATE LANDS COMMISSION,
J. F. HASSLER, [17]
Chairman.

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANT,
STATE OF CALIFORNIA

Comes now the defendant, State of California, one of the defendants in the above action, and for answer to plaintiff's complaint herein, affirms, denies and alleges as follows:

I.

Denies the allegations contained in paragraph I of plaintiff's complaint herein.

II.

Denies the allegations contained in paragraph II of plaintiff's complaint herein, and in this connection alleges:

That the sub-surface estate in the minerals and mineral rights in the property condemned herein are not among the uses and purposes of the Act referred to in paragraphs I and II of plaintiff's complaint herein, and are not suitable and necessary for the purposes of condemnation alleged in such [18] complaint.

That Section 6401 of the Public Resources Code of the State of California specifically provides that in the disposal of all tide and submerged lands there be reserved to the State of California mineral deposits in lands belonging to the State of California.

That on November 4, 1943, the State Lands Commission adopted a resolution requiring that reservation to the State be made of all deposits of

minerals and mineral rights. A certified copy of said resolution attached to the Answer of defendant, State of California as Exhibit "A" and is by this reference incorporated herein.

III.

Denies the allegations of Paragraph III of plaintiff's complaint herein.

IV.

Admits the allegations contained in Paragraph IV of plaintiff's complaint herein.

V.

Respecting the allegations in Paragraph V of plaintiff's complaint herein, defendant, State of California, has no information or belief upon the subject and, placing its denial upon said ground, denies the allegations therein contained.

VI.

Admits the allegations of Paragraph VI of plaintiff's complaint herein.

VII.

Denies the allegations of Paragraph VIII of plaintiff's complaint herein.

VIII.

Admits the allegations of Paragraph IX of plaintiff's [19] complaint herein.

IX.

Admits that the defendant, State of California, has and claims an interest in the property subject to suit, as alleged in paragraph X of plaintiff's complaint herein, and in this connection alleges:

That prior to September 9, 1850, a portion of the lands subject to this action were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date California was admitted into and became a member of the Union of States upon an equal footing with the original States, in all respects, and thereupon and by that fact acquired title to all such tide and submerged lands. That thereafter, and on June 20, 1863, the defendant, State of California, acting through its Governor, Leland Stanford, conveyed by patent to the South San Francisco Homestead and Railroad Association certain of the said tide and submerged lands; that said patent is hereinafter, for convenience, referred to as the "Stanford" patent. That thereafter, and on March 30, 1868, the Legislature of the State of California enacted "An Act to Survey and Dispose of Certain Salt Marsh and Tide Lands Belonging to the State of California." That said Act created a Board of Tide Land Commissioners and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide. That after the

completion of such preliminary survey, the said Board was directed to establish the Water Line Front of San Francisco, and cause all the property belonging to the State lying South of Second Street within the City and County to be surveyed into lots and blocks with reservations of so much thereof for [20] streets, docks, piers, slips, canals, drains or other uses necessary for the public convenience and purposes of commerce as the said Board deemed required. That the said Act further authorized and directed the said Board to prepare maps of the area as re-surveyed, and to cause the lots as so established to be sold at public auction. That pursuant to said Act the said Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which Map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869. That the said "Stanford" patent, hereinbefore referred to, granted to the said South San Francisco Homestead and Railroad Association certain swamp and overflow, tide and submerged lands in addition to and Bayward of the lands delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" as the property of the said South San Francisco Homestead and Railroad Association. That the said survey established, within 24 feet of water at the lowest stage of the tide, the Water Line Front; which said Water Line Front coincided with the easterly line of Water Front Street, as delineated on said Map. That in and by said survey, there were further laid out, established,

reserved and dedicated certain Basins, among which is that area known as Dry Dock Basin. That there were also laid out and established by said survey blocks and lots surrounded by areas delineated upon the said Maps as Streets and Avenues. That said Map contains a certification that said Map correctly exhibits the Water Line Front of the City and County of San Francisco, together with reservations for streets, docks, piers, slips, canals, basins and other uses necessary for public convenience and purposes of commerce. That none of the lands lying within the said Dry Dock Basin has ever been conveyed by the State of California; that none of the lands lying outside the line of the "Stanford" [21] patent to the South San Francisco Homestead and Railroad Association and within the areas designated as Streets and Avenues upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" has ever been conveyed or dedicated by the State of California, by the State Board of Tide Lands Commissioners, or by any municipal corporation, pursuant to authority of the defendant, State of California, or otherwise. That about the year 1890 the Harbor Line Board of the United States Engineers established the present United States Bulkhead Line; that said Bulkhead Line lies Bayward of said Water Line Front and easterly line of Water Front Street. That none of the said tide and submerged lands situated between the said Water Line Front and easterly line of Water Front Street and the said United States Bulkhead Line has ever been conveyed by the State of California.

That the description in plaintiff's complaint herein embraces the following lands:

(1) That area known and designated as Dry Dock Basin;

(2) The Lands lying Bayward of Water Line Front and easterly line of Water Front Street and situated between such line and the United States Bulkhead Line;

(3) The lands lying outside the line of the "Stanford" patent and delineated upon the "Map of Salt Marsh and Tide *Lands Lying Under Water*" as Streets and Avenues.

That the defendant, State of California, is the owner of and was, at the time of the filing of the complaint herein, entitled to the possession of such lands.

That the lands above referred to are hereinafter referred to as Parcels #1, #2, #3A and #3B. [22]

That the said Parcel #1 contains all of the area comprising Dry Dock Basin, together with the land lying Bayward of the Water Line Front and easterly line of Water Front Street and situate between such Water Line Front and the United States Bulkhead Line; that said area is more particularly described as follows:

Commencing at the intersection of the northeasterly extension of the southeasterly line of Coleman Street and the United States Bulkhead Line; thence along said United States

Bulkhead Line southeasterly to the northwesterly line of the Hunters Point Naval Dry Docks; thence southwesterly along said northwesterly line to the "Stanford" patent line; thence westerly along said "Stanford" patent line to the southeasterly line of China Street; thence northeasterly along the southeasterly line of China Street to the easterly line of Water Front Street; thence northerly along the easterly line of Water Front Street to said northeasterly extension of the southeasterly line of Coleman Street; thence northeasterly along said northeasterly extension to the point of commencement, containing 7.909 acres, more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #1 is \$7630.02.

That Parcel #2 contains that area lying Bayward of the line of the Water Line Front and easterly line of Water Front Street and situate between such Water Line Front and the United States Bulkhead Line, and is more particularly described as follows:

Commencing at the intersection of the United States Bulkhead Line and the southwesterly boundary line of the Hunters Point Naval Dry Docks; thence southerly along said United States Bulkhead Line to the southeasterly extension of the northeasterly line of Oakdale Avenue; thence northwesterly along said line

of Oakdale Avenue to the easterly line of Water Front Street; thence in a general northerly direction along the easterly line of Water Front Street, being the Water Line Front, to the southwesterly boundary line of the Hunters Point Naval Dry Docks; thence along said line of the Hunters Point Naval Dry Docks southeasterly to the point of commencement, containing 13.376 acres, more or less. [23]

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #2 is \$14,045.07.

That Parcel #3A contains that area shown on the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association, and delineated upon said Map as Streets and Avenues, and is more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the west by the southeasterly line of Coleman Street, on the north and east by the Water Line Front and on the south by the "Stanford" patent line, containing 6.85 acres, more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #3A is \$616.10.

That Parcel #3B contains that area shown on the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association, delineated upon said Map as streets and avenues, and is more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the east by the Water Line Front, on the south by the northeasterly line of Oakdale Avenue, on the west by the "Stanford" patent line, and on the north by the southwesterly line of the Hunters Point Naval Dry Docks, containing 28.13 acres, more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #3B is \$25,116.15.

That a copy of the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" is attached to the Answer of [24] defendant, State of California, as Exhibit "B" and is by this reference incorporated herein. That the said Exhibit "B" shows the line of the "Stanford" patent, herein before referred to, and shows, delineated in red, the areas owned by the defendant, State of California.

Wherefore, said defendant, State of California, prays:

(1) That the court assess the sum of \$52,907.34 and award the same to the defendant, State of Cali-

fornia, as compensation for the taking of its interest, exclusive of minerals and mineral rights in the said premises, in the land subject to this suit;

(2) That the court adjudge the defendant, State of California, the owner of the sub-surface estate in the minerals and mineral rights;

(3) That the Order granting immediate possession and use of the lands herein, heretofore made on the 4th day of April, 1942, to such extent be modified.

(4) That the court grant such other and further relief as may be meet and proper in the premises.

ROBERT W. KENNY,
Attorney General of the
State of California,

/s/ HAROLD B. HAAS,
Deputy Attorney General,

/s/ MIRIAM E. WOLFF,
Deputy Attorney General,
Attorneys for defendant,
State of California.

[Affidavit of service.]

[Endorsed]: Filed June 21, 1946. [25]

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division.

No. 22147-R

UNITED STATES OF AMERICA,
Plaintiff,
vs.

230.5 ACRES OF LAND in the City and County
of San Francisco, State of California, CAR-
RIE F. REDNALL, et al.,
Defendants.

No. 22261-G

UNITED STATES OF AMERICA,
Plaintiff,
vs.

193 ACRES OF LAND, City and County of San
Francisco, State of California, MATILDA
PRIOR ANDREWS II, et al.,
Defendants.

No. 22416-R

UNITED STATES OF AMERICA,
Plaintiff,
vs.

CERTAIN LAND IN THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALI-
FORNIA, et al.,
Defendants.

STIPULATION AS TO MARKET PLACES

Whereas title to the lands lying within the tide blocks 733 and 734, as the same are delineated upon the "Map of Salt Marsh and Tidelands and Lands Lying Under Water," was claimed, each for itself, by defendant State of California and defendant City and County of San Francisco at the time the above action number 22261 was filed by the United States of America; and is now so claimed; and

Whereas it appears that there are no other claims of title to the lands so delineated; and

Whereas it appears advisable and to the best interests of the parties that said claims be compromised without the necessity of further litigation in respect thereto;

Now, Therefore, the said defendants do hereby stipulate as follows:

I.

Each of said defendants claims that it held legal title to and was entitled to the possession of said lands so delineated at the time the same were condemned in the above cause.

II.

Each of said defendants agrees that it will release and discharge by whatever means may be re-

quired by the United States of America or the above court all its right, title, and interest in and to said land as so delineated upon receipt by it of one-half of the amount mutually agreeable to said defendants and offered by the United States of America, or one-half of such amount as the court awards as the value of the said land so delineated.

III.

This stipulation is an agreement of compromise between the said defendants and may be filed in court in the above cases if desired by the United States of America or the court. [25-B]

IV.

It is prayed that the court make no adjudication of title as between said defendants in respect to said land so delineated, except that the title thereto was disputed by said defendants and that the entire title thereto at the time of condemnation lies between the said defendants.

V.

The defendant City and County of San Francisco stipulates that it withdraws any and all claim of title heretofore made to any of the streets involved in the condemnation in the above causes.

Dated June, 1946.

/s/ ROBERT W. KENNY,
Attorney General of the
State of California,

/s/ HAROLD B. HAAS,
Deputy Attorney General,

/s/ MIRIAM E. WOLFF,
Deputy Attorney General,
Attorneys for Defendant,
State of California.

/s/ JNO. J. O'TOOLE,
City Attorney, City and
County of San Francisco,

/s/ REYNALD J. BIANCHI,
Deputy City Attorney,
City and County of
San Francisco,
Attorneys for Defendant,
City and County of
San Francisco.

[Endorsed]: Filed July 4, 1947. [25-C]

[Title of District Court and Causes.]

STIPULATION ENTERED INTO AT THE
TRIAL OF THE ABOVE CAPTIONED
CASE

Mr. Healy: May it please your Honor, your Honor will recall this trial was to have commenced about three weeks ago, and just after getting started, because of another case, this matter was continued until today. Your Honor requested that counsel make every effort possible to stipulate to as many facts as we could, so that we could simplify the issues.

We have agreed upon certain facts, and they were drawn up. The State drew up the stipulation; and certain portions we were not able to agree with until a short time ago, and with certain amendments made by our office, these facts will read as follows. A little later we will have this document transcribed and presented to your Honor.

The facts we now stipulate to are as follows:

That prior to September 9, 1850, a portion of the land subject to this action, and all of the lands claimed by the State of California, were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date, California was admitted into and became a member of the union of states, upon an equal footing with the original states in all respects, and thereupon and by that fact acquired title to all tide and submerged lands involved in these cases; that said Act of 1868, page

716, created a Board of Tide Land Commissioners, and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and to cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide; that after the completion of such preliminary survey, the Board was directed to establish the Water Line Front of San Francisco, and cause all of the property belonging to the State lying south of Second Street, within the said County to be surveyed into lots and blocks.

That the said Act further authorized and directed the said Board to prepare maps of the area as resurveyed and to cause the lots as so established to be sold at public auction; that pursuant to said Act, the Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869.

That none of the land claimed by the State of California in these answers had been reclaimed at the time said actions were commenced and that all of the land so claimed was tide or submerged lands.

It is further stipulated that the acreage claimed by the State of California in Action No. 22416-R, Parcel No. 1 as described in the amended answer filed by the State is 0.79 acres, and that as to this said portion of the property, the plaintiff is compromising with defendant State of California and

the parties pray that the court continue the hearing as to this parcel until a stipulation for judgment is filed.

That in Action No. 22416-R, in Parcel No. 2 as described in the amended answer filed by the State, the State of California claims 8.73 acres, and the parties do stipulate that 8.73 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

That in Action No. 22416-R, Parcel No. 3 as described in the amended answer filed by the State, the State has been paid its damages and the matter is not at issue as to that parcel.

That in Action No. 22147-R, Parcel No. 1 as described in the amended answer filed by the State, the State of California claims 7.909 acres, and that as to this said portion of the property, the plaintiff is compromising with defendant State of California and the parties pray that the Court continue the hearing as to this parcel until a stipulation for judgment is filed.

That in Action No. 22147-R, Parcel No. 2 as described in the amended answer filed by the State, the State of California claims 13.476 acres and the parties do stipulate that 13.376 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California. [28]

That in Action No. 22147-R, Parcel No. 3A as described in the amended answer filed by the State, the State of California claims 6.85 acres, and the

parties do stipulate that 6.85 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

That in Action No. 22147-R, Parcel No. 3B as described in the amended answer filed by the State, the State of California claims 28.13 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

It is further stipulated that the acreage claimed by the State of California in Action No. 22261-R, Parcel No. 1 as described in the amended answer filed by the State is 1.884 acres, and that as to this said portion of the property, the plaintiff is compromising with defendant State of California and the parties pray that the court continue the hearing as to this parcel until a stipulation for judgment is filed.

That in Action No. 22261-R, Parcel No. 2 as described in the amended answer filed by the State, the State of California claims 64.61 acres, and the parties so stipulate that 64.61 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

That in action No. 22261-R, Parcels Nos. 3A and 3B, the United States of America is compromising the claims of both the State of California and the City and County of San Francisco, and the parties pray that as to said parcels the court continue this hearing until a stipulation for judgment is filed.

That the matters relevant to the causes and not herein stipulated may be heard and determined at the trial on said parcels.

I may say to your Honor now the portions that the gentleman has been pointing to while I have been giving to your Honor the facts stipulated to, all of the portions that appear in blue or, I should say, all of the portions other than in pink, are matters that we have agreed upon, and there is no issue, and your Honor will not be troubled to decide those. Your Honor will be only concerned with the portions [29] in pink on this large map.

Those, your Honor, after considerable conferences and meetings, we believe are the facts we are able to stipulate on, and the other points of the case, I think, are at issue. Is that correct, Mr. Haas?

Mr. Haas: That is correct, your Honor. This map has been set up so that it can be clearly seen that the only things we are here litigating about are the areas colored in pink. All of the rest have been compromised out and are not at issue.

The Court: Very well.

Mr. Haas: It will be stipulated that with the exception of the market places, the lots and blocks inside the street lines were sold off to private individuals and corporations, and that the dispute is over whether or not the street areas were sold off. At least, that is contended, apparently, that they were.

Mr. Healy: I just wanted to know whether we understand each other on this. I am not asking anything about the streets now, because that is something for the Court to determine, but it is an agreed fact, is it not, Counsel, that the area between

the streets, the lot and block area, was sold off to private ownership, to private owners, pursuant to the statute of 1868 by the Board of Tide Land Commissioners? That is so, is it not?

Mr. Haas: That is so, of course, subject to further evidence that we intend to put in as to the method of selling.

Mr. Healy: We won't talk about the method of selling, but it was sold. Did I state it fairly and accurately?

Mr. Haas: I can't speak for the State. So far as our records show.

Mr. Healy: That is an agreed fact in the case?

Mr. Haas: Yes.

Mr. Healy: All right. That is all.

And the area that I was talking about is the area that is embraced [30] within the confines of these three actions.

Mr. Haas: That is that portion of the area embraced within the confines of these three actions——

Mr. Healy: Other than the Stanford Grant.

Mr. Haas: I was going to say it was the Tide Land. We are making no claims to the central part, the Stanford grant.

[Endorsed]: Filed July 12, 1946. [31]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division.

No. 22147-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

230.5 ACRES OF LAND in the City and County
of San Francisco, State of California, CAR-
RIE F. REDNALL, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action was consolidated for trial with United States vs. 193 acres of land in the City and County of San Francisco, State of California, Civil 22261-R, and United States vs. Certain land in the City and County of San Francisco, State of California, Civil No. 22416-R, and came on for hearing the 25th day of June, 1946, before the above entitled Court, the Honorable Michael J. Roche presiding, a jury having been waived by all parties, the cause having been duly and regularly continued to June 26, 1946, for further hearing and M. Mitchell Bourquin, Special Assistant to the Attorney General, John J. Healy, Jr., and J. Harold Weise, Special Attorneys, appearing for the plaintiff, United States of America, and Robert W. Kenny, Attorney General of the

State of California, Harold B. Haas and Miriam E. Wolff, Deputies Attorney General, appearing for the State of California, and the evidence having been duly taken and heard and the cause submitted for decision, the Court makes and files its Findings of Fact and Conclusions of Law as follows: [32]

I.

That the Complaint in the above entitled action was filed on the 4th day of April, 1942; that on the 22nd day of April, 1942, plaintiff filed a Declaration of Taking and deposited in the Registry of the Court, the sum of Seven Hundred Fifty-five Thousand Three Hundred and 86/100 Dollars (\$755,300.86) estimated just compensation for the taking of the property the subject of this action of which said sum One and no/100 Dollar (\$1.00) was deposited for the taking of Parcels 3A and 3B as hereinafter more particularly described. That on said day April 22, 1942, a Judgment on said Declaration of Taking was entered decreeing that the title to all the land subject of the above entitled proceeding, including the land herein referred to as Parcels 3A and 3B and hereinafter more particularly described, vested in the United States of America in fee simple and the right to just compensation therefor vested in the persons entitled thereto upon the filing of said Declaration of Taking.

II.

That the above entitled action was instituted and the lands the subject matter of said action are

taken and condemned pursuant to, and under the authority of the Act of Congress approved July 19, 1940 (Public Law No. 757, 76th Congress, Third Session), which act authorizes the acquisition of land for Naval purposes and the Second War Powers Act of 1942 (S2208, 77th Congress, Second Session).

III.

That said lands were taken and condemned under the authority of the above mentioned acts of Congress for the expansion of facilities at the Naval Drydock, Hunters Point, San Francisco, California, and are suitable and necessary for said purpose; that said use of said lands constitutes a public use, and that the acquisition of said lands by plaintiff was of the greatest public benefit and the least private injury.

IV.

That service has been properly made upon all persons interested in said lands hereinafter described: [33]

V.

That prior to September 9, 1850, the lands subject of this trial were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date, California was admitted into and became a member of the union of states, upon an equal footing with the original states in all respects, and thereupon and by that fact acquired title to all tide and submerged lands involved in this

trial; that the Act of 1868 (Stats. of Cal. 1867-68, page 716) created a Board of Tide Land Commissioners, and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and to cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide; that after the completion of such preliminary survey, the Board was directed to establish the Water Line Front of San Francisco, and cause all of the property belonging to the State lying south of Second Street, within the said County to be surveyed into lots and blocks.

That the said Act further authorized and directed the said Board to prepare maps of the area as re-surveyed and to cause the lots as so established to be sold at public auction; that pursuant to said Act, the Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which map was duly adopted by the said Board of Tide Land Commissioners on March, 1869.

That none of the land claimed by the State of California in this action had been reclaimed at the time said action was commenced and that all of the land so claimed was tide or submerged lands.

VI.

That pursuant to said statute, said Tide Land Commissioners sold, at public auction, all the right, title, and interest of defendant, State of California,

in and to the property in said lots exhibited on said map and said sales were by lots in accordance with said survey and map.

VII.

That said Parcels 3A and 3B, respectively, embrace and are a portion [34] of certain streets and alleys exhibited and delineated upon said map, "Map of Salt Marsh and Tide Lands and Lands Lying Under Water."

VIII.

That the interest or title that defendant, State of California, retained in said Parcels 3A and 3B, respectively, was retained only for the purpose of providing ingress and egress to said lots sold and that the interest or title of defendant, State of California, in and to said parcels at the date of the taking herein was subject to easements for access to and from said lots exhibited and delineated upon said survey and map.

IX.

That Parcel 3A is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the west by the southeasterly line of Coleman Street, on the north and east by the Water Line Front and on the south by the "Stanford" patent line, containing 6.85 acres, more or less.

That just compensation for said parcel including any and all damages to the larger tract of which said Parcel 3A is a part is the sum of One and no/100 Dollar (\$1.00).

X.

That Parcel 3B is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the east by the Water Line Front, on the south by the northeasterly line of Oakdale Avenue, on the west by the "Stanford" patent line, and on the north by the southwesterly line of the Hunters Point Naval Drydocks, containing 28.13 acres, more or less.

That just compensation for said parcel including any and all [35] damages to the larger tract of which said Parcel 3B is a part is the sum of One and no/100 Dollar (\$1.00).

XI.

Except as hereinbefore more particularly set forth all of the allegations, the Plaintiff's Complaint are true.

XII.

Except as hereinbefore more particularly set forth all the allegations of the answer and amended answer of defendant, State of California, are not true.

Conclusions of Law

I.

That the Court has jurisdiction of the parties and the subject matter of this action.

II.

That the use for which the property is taken is a public use of the United States and that the United States is authorized by law to acquire the same by condemnation.

III.

That the damage suffered by the State of California for the taking of Parcel 3A is the sum of One and no/100 Dollar (\$1.00).

That the damage suffered by the State of California for the taking of Parcel 3B is the sum of One and no/100 Dollar (\$1.00).

IV.

That a Judgement of Condemnation in the form provided by law shall be made and entered herein.

V.

Let Judgment be entered accordingly.

Done in Open Court, this 22nd day of January, 1947.

MICHAEL J. ROCHE,
Judge.

Receipt of the foregoing Findings of Fact and Conclusions of Law is hereby acknowledged this 12th day of December, 1946.

ROBERT W. KENNY,
Attorney General of the
State of California,

By HAROLD H. HAAS,
Deputy Attorney General.

[Endorsed]: Filed Jan. 22, 1947. [36]

[Title of District Court and Cause.]

FINAL JUDGMENT AS TO PARCELS
3-A AND 3-B

The above entitled action was consolidated for trial with United States v. 193 Acres of land in the City and County of San Francisco, State of California, Civil 22261-R and United States v. Certain land in the City and County of San Francisco, State of California Civil No. 22416-R, and came on for hearing the 25th day of June, 1946, before the above entitled Court, the Honorable Michael J. Roche presiding, a jury having been waived by all parties, the cause having been duly and regularly continued to June 26, 1946, for further hearing and M. Mitchell Bourquin, Special Assistant to the Attorney General, John J. Healy, Jr., and J. Harold Weise, Special Attorneys appearing for the plaintiff, United States of America, and

Robert W. Kenny, Attorney General of the State of California, Harold B. Haas and [37] Miriam E. Wolff, Deputies Attorney General, appearing for the State of California, and the evidence, both oral and documentary, having been introduced by the parties hereto and the case having been fully tried and presented to the Court, and briefs having been submitted by the respective parties and the cause having been submitted for decision on the 19th day of October, 1946, and the Court having heretofore filed its written Findings of Fact and Conclusions of Law;

Wherefore, by reason of the law and the findings herein.

It Is Hereby Ordered, Adjudged And Decreed:

I.

That the title to Parcels 3-A and 3-B of the lands subject of the above entitled action vested in the United States of America in fee simple absolute on the 22nd day of April, 1942.

II.

That Parcel 3-A is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the west by the southeasterly line of Coleman Street, on the north and east by the Water Line Front and on the south by the "Stanford" patent line, containing 6.85 acres, more or less.

III.

That Parcel 3-B is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the east by the Water Line Front, on the south by the northeasterly line of Oakdale Avenue, on the west by the "Stanford" patent line, and on the north by the southwesterly line of the Hunters Point Naval Drydocks, containing 28.13 acres, more or less.

IV.

That the defendant State of California is awarded the sum of One Dollar for each of said Parcels 3-A and 3-B, respectively, [38] together with interest from the date of the entry of this Judgment until paid.

Done In Open Court, this 22nd day of January, 1947.

MICHALE J. ROCHE,
Judge.

Approved as to form:

FRED N. HOWSER,
Attorney General of the
State of California.

By MIRIAM E. WOLFF,
Deputy Attorney General,
Attorney for the State of
California.

[Endorsed]: Filed and Entered Jan. 22, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Michael J. Roche, Judge of the District Court of the United States, Southern Division, Northern District of California, and to M. Mitchell Bourquin, Esq., Special Assistant to the Attorney General, and John H. Healy, Jr. and John Harold Weise, Esqs., Attorneys for Plaintiff:

You and each of you will please take notice that the defendant, State of California, hereby appeals, to the United States Circuit Court of Appeals, Ninth Judicial District, from that portion of the final judgment as to parcels 3-A and 3-B therein awarding defendant, State of California, the sum of One Dollar for its interest therein and denying defendant, State of California, any further or additional compensation for the taking of said property.

Dated: April 21, 1947.

/s/ FRED N. HOWSER,
Attorney General.

/s/ HAROLD B. HAAS,
Deputy Attorney General.

/s/ MIRIAM E. WOLFF,
Deputy Attorney General.
Attorneys for Defendant
State of California.

[Affidavit of service by mail.]

[Endorsed]: Filed April 21, 1947. [40]

In The District Court of the United States in
and for the Northern District of California,
Southern Division

No. 22147-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

230.5 Acres of Land in the City and County of San
Francisco, State of California, CARRIE F.
REDNALL, et al.,

Defendants.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That Pacific Indemnity Company a corporation
duly organized and existing under and by virtue
of the laws of the State of California, and duly
licensed to transact a surety business in the State
of California, is held and firmly bound unto the
United States of America, plaintiff in the above
entitled action, in the sum of Two Hundred Fifty
and No/100 Dollars (\$250.00), to be paid unto said
United States of America, for which payment well
and truly to be made Pacific Indemnity Company
binds itself, its successors and assigns firmly by
these presents.

Signed, Sealed And Dated This 10th Day Of March, 1947.

The condition of the above obligation is such that [41] whereas State of California, defendant in the above entitled cause, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled court entered in said cause on the 22nd day of January, 1947;

Now, Therefore the condition of the above obligation is such that is the said appellant, State of California, shall pay all costs if the said appeal is dismissed or the said judgment affirmed, or such costs as the appellate court may award if the said judgment is modified, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

It Is Further Stipulated as a part of the foregoing bond that in case of a breach of any condition thereof, the above named District Court may, upon notice to said surety of not less than ten days, proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and award execution therefor.

PACIFIC INDEMNITY CO.

[Seal] By R. L. TRAVISS,
Attorney in Fact.

State of California,
City and County of San Francisco—ss:

On this 10th day of March in the year one thousand nine hundred and forty-seven before me, Emily K. McCorry a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. L. Traviss, known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. L. Traviss acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 21, 1950.

[Endorsed]: Filed April 21, 1947. [42]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS
TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

It appearing to the court that the exhibits in the above entitled matter consist of maps, diagrams and original papers, not capable of reproduction in the printed record,

Now, Therefore, It Is Hereby Ordered that copies of the original papers and exhibits which were introduced in evidence during the trial of said cause need not be copied in the Record of Appeal in said cause to be filed in connection with the appeal of said defendant and appellant, and that all original papers and exhibits introduced in evidence at the trial of said cause in the above entitled court by plaintiff, United States of America, and defendant, State of California, [43] with respect to Parcels 3-A and 3-B, together with all the original papers and exhibits introduced in evidence at the trial of said action with respect to Parcel 2 of action 22261-R and Parcel 2 of action 22416-R, which actions were consolidated with the above entitled action for the purposes of trial, may be transferred and transmitted in their original form to the court to which said appeal is taken, namely, the United States Circuit Court of Appeals for the Ninth Circuit; and

It Is Further Ordered that all such original papers and exhibits shall be included in and be a part of the Record on Appeal to the same effect as though copied therein.

It Is Further Ordered that the said exhibits and testimony introduced in evidence at the trial of Parcels 3-A and 3-B of the above entitled action were also introduced in evidence with reference to Parcel 2 of action 22261-R and Parcel 2 of action 22416-R, which actions were consolidated with the above entitled action for the purposes of trial, and that the original papers and exhibits, all of which are the subject of this Order, may be considered by the court with like effect with reference to Parcel 2 of action 22261-R and Parcel 2 of action 22416-R.

Dated: July 29, 1947.

GEORGE B. HARRIS,

Judge of the U. S.

District Court.

[Endorsed]: Filed July 29, 1947. [44]

[Title of District Court and Cause.]

STIPULATION AND AGREEMENT FOR
CONSOLIDATION

Whereas, this case with respect to Parcels 3-A and 3-B was consolidated with case 22261-G with respect to Parcel 2 of that case, and with case 22416-R with respect of Parcel 2 of that case, for purposes of trial, the evidence relating to each of the

above parcels being considered with reference to each of the other parcels; and judgment having been entered on January 22, 1947, in each of these cases as to each of these parcels in the amount of \$1.00 each, and the State of California having filed notice of appeal in each of these cases dated April 21, 1947, as to each of these judgments for each of the aforementioned parcels; and

Whereas, it is the intention of the State of California to appeal said cases to the Ninth Circuit Court of Appeals;

Therefore, it is hereby stipulated by the State of California, one of the Defendants herein, by Fred N. Howser, Attorney General of the State of California, and Harold B. Haas, Deputy Attorney General of the State of California, and Miriam E. Wolff, Deputy Attorney General of the State of California, and the United States of America, Petitioner, by J. Edward Williams, Acting Assistant Attorney General of the United States, and M. Mitchell Bourquin, Special Assistant to the Attorney General, that said causes, to wit: Civil Nos. 22147-R with respect to Parcels 3-A and 3-B 22261-G with respect to Parcel 2, and 22416-R with respect to Parcel 2, above designated, be consolidated as one cause for the purpose of appealing the same to the Ninth Circuit Court of Appeals. It is further agreed that but one appeal be prosecuted regarding such consolidated cases, and that the record be printed and treated as one, and that all considerations, orders, judgments and mandates

made by the Ninth Circuit Court of Appeals be effective in each case above described the same as if the appeal had been taken in each case individually.

Dated: this 27th day of August, 1947.

THE STATE OF CALIFORNIA,
Defendant.

By /s/ FRED M. HOWSER,
Attorney General of the State
of California.

/s/ HAROLD B. HAAS,
Deputy Attorney General of
the State of California.

/s/ MIRIAM E. WOLFF,
Deputy Attorney General of
the State of California.

UNITED STATES
OF AMERICA,
Petitioner.

By /s/ J. EDWARD WILLIAMS,
Acting Assistant Attorney General of the United
States of America.

M. MITCHELL BOURQUIN,
Special Assistant to the
Attorney General.

[Endorsed]: Filed August 27, 1947. [46]

[Title of District Court and Cause.]

ORDER CONSOLIDATING CAUSES
ON APPEAL

Upon the filing and reading of the Stipulation and Agreement to consolidate this case with respect to Parcels 3-A and 3-B with case 22261-G with respect to Parcel 2 of that case, and with case 22416-R with respect to Parcel 2 of that case for purposes of Appeal to the Circuit Court of Appeals for the Ninth Circuit, and good cause appearing therefore,

It is hereby ordered that said causes, to wit:

Civil Nos. 22147-R with respect to Parcels 3-A and 3-B, 22261-G with respect to Parcel 2, and 22416-R with respect to Parcel 2, above designated, be and the same are hereby consolidated as one cause for the purpose of appealing the same to the Ninth Circuit Court of Appeals, and it is further ordered [47] that but one appeal be prosecuted regarding such consolidated causes, and that the record be printed and treated as one and the same appeal.

Dated at San Francisco, California, this 28th day of August, 1947.

MICHAEL J. ROCHE,
Judge, United States
District Court.

FRANCIS A. GARRECHT,
Judge, Circuit Court
of Appeals.

[Endorsed]: Filed August 28, 1947. [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes Now Appellant, State of California, one of the defendants above named, and states that its appeal is from that portion of the judgment decreeing that the State of California is entitled to receive the sum of One and no/100 (\$1.00) Dollars and no more for the taking of parcel 3-A and the sum of One and no/100 (\$1.00) Dollars and no more for the taking of parcel 3-B, which was given, made and entered in the above entitled cause on the 22nd day of January, 1947, and that said appellant will rely on its appeal herein on the following points.

I.

That the above-named United States District Court erred in finding that the interest or title that defendant, State of California, retained in said parcels 3-A and 3-B was retained only for the purpose of providing ingress and egress to said lots sold.

II.

That the said Court erred in finding that the interest or title that defendant, State of California, retained in said parcels 3-A and 3-B at the date of the taking herein was subject to easements for access to and from said lots delineated upon said survey map.

III.

That the said Court erred in finding that just compensation for the taking of said parcels 3-A and 3-B, including any and all damages to the larger tract of which said parcels 3-A and 3-B are a part, is the sum of Two and no/100 (\$2.00) Dollars.

IV.

That the said Court erred in not finding that said property was never laid out upon the grounds as streets.

V.

That the said Court erred in not finding and in not concluding that the said property was never opened nor declared open as streets.

VI.

That the said Court erred in not finding and in not concluding that the said property was never dedicated as streets.

VII.

That the said Court erred in not finding and in not concluding that the said property was not subjected to any [50] easement as streets.

VIII.

That the said Court erred in rendering its decision and making and entering its judgment herein in that the evidence was and is insufficient to justify the judgment rendered by said Court.

IX.

That the said Court erred in rendering its decision and making and entering its judgment herein against the defendant, State of California, in that said judgment is contrary to the law and the facts.

X.

That the said Court erred in not making its judgment herein in favor of defendant, State of California and against plaintiff United States of America in the sum of \$31,232.25.

Dated: June 15, 1947.

FRED N. HOWSER,
Attorney General of the State
of California,

/s/ HAROLD B. HAAS,
Deputy Attorney General,

/s/ MIRIAM E. WOLFF,
Deputy Attorney General,
Attorneys for defendant
State of California.

[Endorsed]: Filed Sept. 4, 1947. [51] ,

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 22147-R

UNITED STATES OF AMERICA,

vs. Plaintiff,

230.5 Acres of land in the City and County of San
Francisco, State of California, CARRIE F.
REDNALL, et al.,

Defendants.

No. 22261-R

UNITED STATES OF AMERICA,

vs. Plaintiff,

193 Acres of land, City and County of San Fran-
cisco, State of California, MATILDA PRIOR
ANDREWS II, et al.,

Defendants.

No. 22416-R

UNITED STATES OF AMERICA,

vs. Plaintiff,

CERTAIN LAND IN THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALI-
FORNIA, et al.,

Defendants. [52]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS AND EVI-
DENCE TO BE CONTAINED IN THE
RECORD ON APPEAL

The following portions of the record, proceedings
and evidence in the above three cases are hereby

designated by appellant to be the portions of the record, proceedings and evidence to be contained in the record on appeal in this cause.

In action No. 22147-R:

- (1) Complaint;
- (2) Answer of Defendant, State of California;
- (3) Amended Answer of Defendant, State of California;
- (4) Stipulation entered into at the trial of the above-captioned case;
- (5) Stipulation as to Market Places entered into between the Defendant, State of California, and the Defendant, City and County of San Francisco;
- (6) Findings of Fact and Conclusions of Law, with respect to Parcels 3-A and 3-B;
- (7) Judgment as to Parcels 3-A and 3-B;
- (8) Notice of Appeal;
- (9) Bond for costs on Appeal;
- (10) All exhibits introduced by plaintiff United States of America and Defendant State of California with respect to Parcels 3-A and 3-B and all exhibits introduced by plaintiff United States of America and Defendant State of California with respect to Parcel 2 of action 22261-R and Parcel 2 of action 22416-R which actions were consolidated with the above-entitled action for the purposes of trial;
- (11) All testimony and proceedings of the trial with respect to Parcels 3-A and 3-B contained in the original Transcript of Testimony prepared by

the Official Court Reporter, together with all testimony and proceedings of the trial with respect to Parcel 2 of action 22261-R and Parcel 2 of action 22416-R, which actions were consolidated with the above-entitled action for the purposes of trial;

(12) Statement of Points on which Appellant intends to rely on appeal; [53]

(13) Order for transmission of exhibits to the United States Circuit Court of Appeals;

(14) Stipulation and agreement for consolidation;

(15) Order consolidating causes on appeal;

(16) This Designation;

(17) Clerk's Certificate.

In action No. 22261-R:

(18) Complaint and Order for immediate possession;

(19) Answer of Defendant, State of California;

(20) Amendment to Complaint;

(21) Amended Answer of Defendant, State of California;

(22) Findings of Fact and Conclusions of Law with respect to Parcel No. 2;

(23) Judgment as to Parcel No. 2;

(24) Notice of Appeal;

(25) Bond for Costs on Appeal;

(26) Statement of Points on which appellant intends to rely on appeal.

In action No. 22416-R:

(27) Complaint and Order for immediate possession;

(28) Answer of Defendant, State of California;

(29) Amended Answer of Defendant, State of California;

(30) Findings of Fact and Conclusions of Law with respect to Parcel No. 2;

(31) Judgment as to Parcel No. 2;

(32) Notice of Appeal;

(33) Bond for Costs on Appeal;

(34) Statement of points which appellant intends to rely on appeal.

Dated September 4, 1947.

FRED N. HOWSER,

Attorney General of the
State of California,

/s/ HAROLD B. HAAS,

Deputy Attorney General,

/s/ MIRIAM E. WOLFF,

Deputy Attorney General,
Attorneys for Defendant
State of California.

[Affidavit of mailing.]

[Endorsed]: Filed Sept. 4, 1947. [54]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 22261-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

193 ACRES OF LAND, City and County of San
Francisco, State of California, and MATILDA
PRIOR ANDREWS II, et al.,
Defendants.

COMPLAINT IN CONDEMNATION

Now comes the United States of America, by
M. Mitchell Bourquin, Special Assistant to the
Attorney General, at the direction and under the
authority of the Attorney General of the United
States, and pursuant to the request of the Acting
Secretary of the Navy, and for cause of action
against the above named defendants, alleges as
follows:

I.

That this proceeding is instituted and the lands
hereinafter described are taken pursuant to the
provisions contained in the Act of Congress ap-
proved January 29, 1942 (Public Law 420, 77th
Congress, 56 Stat., Chap. 25), and the Act of Con-
gress approved February 7, 1942 (Public Law 441,
77th Congress, 56 Stat., Chap. 46), appropriating
funds therefor.

II.

That the lands hereinafter described are taken and condemned under the authority of the above mentioned Acts of Congress for the uses and purposes authorized by said Acts, and are sought and taken for use in connection with the establishment of the Naval Dry Docks, Hunters Point, California, and are suitable and necessary for said purpose; that said use of said lands constitutes a public use, and said lands have been selected by the Acting Secretary of the Navy for acquisition for said purposes and uses above stated, and are required for immediate use in order that the necessary work may be begun thereon for carrying out said purposes and uses.

III.

That the acquisition of said lands by plaintiff will be of the greatest public benefit and the least private injury; that no part of said lands has heretofore been [57] appropriated for public use by said plaintiff or for the State of California, or any political subdivision thereof.

IV.

That the estate or interest which plaintiff seeks to take and condemn is the fee simple title to the hereinafter described lands.

V.

That there are sufficient funds now available with which plaintiff can and is authorized to pay just

compensation for the lands sought to be taken and condemned herein, in whatever sum may be ultimately awarded in this proceeding for the taking of said lands and any damages resulting therefrom.

VI.

That the lands to be taken and condemned in this proceeding aggregate 193 acres, are situate in the City and County of San Francisco, State of California, and are more particularly described as follows:

Beginning at the intersection of the Northeasterly line of Oakdale Avenue with the Southeasterly line of Donahue Street; thence Southeasterly along the Northeasterly line of said Oakdale Avenue to the U. S. Government Bulkhead line; thence Southerly along the said U. S. Government bulkhead line to its intersection with the Southwesterly line of Shafter Avenue; thence Northwesterly along the Southwesterly line of Shafter Avenue to its intersection with the Southeasterly line of Alvord Street; thence Southwesterly along the Southeasterly line of Alvord Street to its intersection with the Southwesterly line of Wallace Avenue; thence Northwesterly along the Southwesterly line of Wallace Avenue to its intersection with the Southeasterly line of Donahue Street; thence Northeasterly along the Southeasterly line of Donahue Street to the place of beginning, containing 193 acres, more or less.

VII.

That a plan showing the lands taken as above described is attached hereto, marked Exhibit "A", and made a part hereof by reference.

VIII.

That plaintiff is informed and believes and therefore alleges that none of said lands taken by this proceeding are a part of any larger tract belonging to the apparent or purported owners of said lands herein described.

IX.

That each of the defendants named in the title to this action may have or claim some interest in the above described land.

X.

That the defendants, City and County of San Francisco and State of California may have or claim some interest or lien in and to the above-described lands for taxes.

XI.

That the defendants First Doe to Fifteenth Doe, inclusive, and First Doe Corporation to Tenth Doe Corporation, inclusive, are used and designated herein by fictitious names for the reason that their true names are unknown to plaintiff, but the plaintiff will, upon ascertaining their true names, substitute the same for such fictitious names by appropriate amendment, and prays such leave of the

Court; that defendants, and each of them, may have or claim to have an interest in some piece or parcel of the lands sought to be taken and condemned in this action, but that the nature, character or extent of such interest is unknown to plaintiff. [59]

XII.

That a state of war now exists between the plaintiff, United States of America, and certain foreign governments, and pursuant to the provisions of the Second War Powers Act, Public Law 507, 77th Congress, Second Session, approved March 27, 1942, the plaintiff, upon the filing of this Complaint in this proceeding, becomes entitled to the right to take immediate possession of the above described lands.

XIII.

That the Acting Secretary of the Navy has determined that it is necessary, advantageous and in the interest of the United States that an order be obtained from this Court authorizing said Navy Department to take immediate possession of the above described lands to the extent of the interest above described, and the above mentioned Special Assistant to the Attorney General has been authorized and directed by the Attorney General of the United States to take proper proceedings herein to acquire such order from this Honorable Court.

Wherefore, plaintiff prays:

1. For an order authorizing and directing the United States to take immediate possession of the above described lands.

2. For judgment:

(a) Decreeing that said lands above described, to the extent of the title and interest which plaintiff seeks to acquire by this action, are condemned for necessary public uses of the plaintiff as authorized by law; that all of said lands are necessary and suitable thereto;

(b) Determining the value of the lands subject of this action and each separate interest therein, and directing the payment for each separate interest to the [60] persons entitled thereto.

3. For such other and further relief as the Court may deem proper in the premises.

/s/ M. MITCHELL BOURQUIN,
Special Assistant to the
Attorney General,
Attorney for Plaintiff. [61]

VERIFICATION

United States of America,
Northern District of California,
City and County of San Francisco—ss.

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States and attorney for the plaintiff in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein

stated on his information or belief, and as to those matters that he believes it to be true.

That the reason this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign.

That the sources of affiant's information and the grounds for his belief are the official communications, records, files and documents received from the Attorney General of the United States, and from the Navy Department of the United States.

/s/ M. MITCHELL BOURQUIN.

Subscribed and sworn to before me this 25th day of July, 1942.

[Seal] LOUIS V. VASQUEZ,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 4, 1943.

[Endorsed]: Filed July 25, 1942. [62]

[Title of District Court and Cause.]

ORDER FOR IMMEDIATE POSSESSION

Upon reading the Complaint on file in the above entitled action, and it appearing that application has been made by plaintiff to be let into immediate possession of the lands subject of this action and hereinafter described, and to use said lands to the extent and for the purposes as alleged in said Complaint and to proceed thereon with the public works

authorized by Congress and directed by the Acting Secretary of the Navy:

Now, Therefore, It Is Ordered that the United States of America be, and it is hereby granted leave to take immediate possession of the lands subject of this action and hereinafter described, to the extent of the estate and interest to be acquired in this action, to-wit: the fee simple title to said lands for use in connection with the establishment of the Naval Dry Docks, Hunters Point, California, and for related military purposes, and to proceed thereon with such public works as have been authorized by Congress and directed by the Acting Secretary of the Navy.

And It Appearing that the United States of America has made adequate provision for the payment of just compensation to the parties entitled thereto by virtue of the appropriations made by Congress therefor, as set forth in the Complaint on file herein, it shall not be necessary for the United States to deposit any sum of money or other form of security for the purpose of securing payment of compensation to the parties entitled thereto.

The United States Marshal is hereby authorized and directed to place plaintiff in possession of said property.

Following is a particular description of the lands affected by this order, which said lands are situate

in the City and County of San Francisco, State of California: [65]

Beginning at the intersection of the Northeasterly line of Oakdale Avenue with the Southeasterly line of Donahue Street; thence Southeasterly along the Northeasterly line of said Oakdale Avenue to the U. S. Government bulkhead line; thence Southerly along the said U. S. Government bulkhead line to its intersection with the Southwesterly line of Shafter Avenue; thence Northwesterly along the Southwesterly line of Shafter Avenue to its intersection with the Southeasterly line of Alvord Street; thence Southwesterly along the Southeasterly line of Alvord Street to its intersection with the Southwesterly line of Wallace Avenue; thence Northwesterly along the Southwesterly line of Wallace Avenue to its intersection with the Southeasterly line of Donahue Street; thence Northeasterly along the Southeasterly line of Donahue Street to the place of beginning, containing 193 acres, more or less.

The Court reserves the right hereafter to make such other and further orders, judgments and decrees herein as may be necessary in the premises.

Done in open Court, this 25th day of July, 1942.

/s/ MICHAEL J. ROCHE,
Judge.

[Endorsed]: Filed July 25, 1942. [66]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 22261-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

193 ACRES OF LAND, City and County of San
Francisco, State of California, et al.,

Defendants.

ANSWER OF DEFENDANT, STATE OF
CALIFORNIA

Comes now the defendant, State of California,
one of the defendants in the above action, and for
answer to plaintiff's complaint herein, affirms, de-
nies and alleges as follows:

I.

Denies all the allegations contained in paragraph
I of plaintiff's complaint herein.

II.

Denies the allegations contained in paragraph II
of plaintiff's complaint herein, and in this connec-
tion alleges:

That it is not necessary, for the purposes men-
tioned in said paragraph II, to acquire the sub-
surface estate, consisting [67] of the mineral and
mineral rights, in and to the property condemned
herein; that the acts referred to in said paragraphs

I and II of the complaint herein do not authorize the condemnation or taking of minerals and mineral rights in property where such taking or condemnation is not essential to the uses and purposes for which the property is condemned.

That Section 6401 of the Public Resources Code of the State of California provides that in the disposal of all tide and submerged lands, belonging to the State of California, there be reserved to the State the mineral deposits and mineral rights in lands authorized to be sold.

That on November 4, 1943, the State Lands Commission adopted a resolution requiring that reservation to the State be made of all deposits of minerals and mineral rights. A certified copy of said resolution is attached hereto and made a part hereof and for reference is marked Exhibit "A."

III.

Denies the allegations of paragraph III of plaintiff's complaint herein.

IV.

Admits as alleged in paragraph IV that the estate or interest which plaintiff seeks to condemn in the lands described in the complaint is the fee simple title thereto, but in this connection this defendant alleges that such estate or interest is not necessary for the purposes mentioned in paragraphs I and II of the complaint; that it is not necessary to condemn the minerals and mineral rights in said described lands.

V.

Respecting the allegations contained in paragraph V of plaintiff's complaint herein, defendant, State of California, has no information or belief upon the subject, and, placing its denial upon said grounds, denies the allegations thereof. [68]

VI.

Admits the allegations of paragraph VI of plaintiff's complaint herein.

VII.

Admits that the defendant, State of California, has and claims an interest in the property subject to suit, as alleged in paragraph IX of plaintiff's complaint herein, and in this connection alleges:

That prior to September 9, 1850, a portion of the lands subject to this action were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date California was admitted into and became a member of the Union of States upon an equal footing with the original States, in all respects, and thereupon and by that fact acquired title to all such tide and submerged lands. That thereafter, and on June 20, 1863, the defendant, State of California, acting through its Governor, Leland Stanford, conveyed by patent to the South San Francisco Homestead and Railroad Association certain of the said tide and submerged lands; that said patent was recorded in the Office of the Recorder of the City and County of San

Francisco in Liber 1 of Patents, at page 44; that said patent is hereinafter, for convenience, referred to as the "Stanford" patent. That thereafter, and on March 30, 1868, the Legislature of the State of California enacted "An Act to Survey and Dispose of Certain Salt Marsh and Tide Lands Belonging to the State of California." That said Act created a Board of Tide Land Commissioners and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide. That after the completion of such preliminary survey, the said Board was directed to establish the [69] Water Line Front of San Francisco, and cause all the property belonging to the State lying South of Second Street within the City and County to be surveyed into lots and blocks with reservations of so much thereof for streets, docks, piers, slips, canals, drains or other uses necessary for the public convenience and purposes of commerce as the said Board deemed required. That the said Act further authorized and directed the said Board to prepare maps of the area as resurveyed, and to cause the lots as so established to be sold at public auction. That pursuant to said Act the said Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which Map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869. That the said "Stanford" patent,

hereinbefore referred to, granted to the said South San Francisco Homestead and Railroad Association certain swamp and overflow, tide and submerged lands in addition to and Bayward of the lands delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" as the property of said South San Francisco Homestead and Railroad Association. That the said survey established, within 24 feet of water at the lowest stage of the tide, the Water Line Front; which said Water Line Front coincided with the easterly line of Water Front Street, as delineated on said Map. That the said Board of Tide Land Commissioners, by resolution duly made and recorded, reserved and dedicated certain market places and produce exchanges; that among such market places were those areas delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" as Tide Blocks 733 and 734. That said Tide Blocks 733 and 734 have never been conveyed by the defendant, State of California, the Board of Tide Land Commissioners, or any officer or department acting for or in behalf of either said defendant, State of California, or said Board of Tide Land Commissioners. [70] That there were also laid out and established by said survey blocks and lots surrounded by areas delineated upon the said Map as Streets and Avenues. That said Map contains a certification that said Map correctly exhibits the Water Line Front of the City and County of San Francisco, together with reservations for streets, docks, piers, slips, canals, basins and other uses

necessary for public convenience and purposes of commerce; that none of the lands lying outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association and within the areas designated as Streets and Avenues upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" has ever been conveyed or dedicated by the State of California, by the State Board of Tide Land Commissioners, or by any municipal corporation, pursuant to authority of the defendant, State of California, or otherwise.

That about the year 1890 the Harbor Line Board of the United States Engineers established the present United States Bulkhead Line; that said Bulkhead Line lies Bayward of said Water Line Front and easterly line of Water Front Street. That none of the said tide and submerged lands situated between the said Water Line Front and the said United States Bulkhead Line has ever been conveyed by the State of California.

That the description in plaintiff's complaint herein embraces the following lands:

(1) The lands lying Bayward of Water Line Front and easterly line of Water Front Street and situated between such line and the United States Bulkhead Line;

(2) The lands lying outside the line of the "Stanford" patent and delineated upon the "Map of Salt Marsh [71] and Tide Lands and Lands Lying Under Water" as Streets and Avenues.

(3) The lands lying within Tide Blocks 733 and 734, as the same are delineated upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water."

That the defendant, State of California, is the owner of and was, at the time of the filing of the complaint herein, entitled to the possession of such lands.

That the lands above referred to are hereinafter referred to as Parcels Nos. 1, 2, 3A and 3B.

That Parcel No. 1 contains that area lying Bayward of the line of the Water Line Front Street and situate between such Water Line Front and the United States Bulkhead Line, and is more particularly described as follows:

"Commencing at the intersection of the United States Bulkhead Line with the southeasterly extension of the northeasterly line of Oakdale Avenue; thence southerly along said United States Bulkhead Line to its intersection with the southeasterly extension of the southwesterly line of Shafter Avenue; thence northwesterly along said southeasterly extension of the southwesterly line of Shafter Avenue to the southerly line of Water Front Street; thence along the southerly and easterly line of Water Front Street northerly to said southeasterly extension of the northeasterly line of Oakdale Avenue; thence along said southeasterly extension of the northeasterly line of Oakdale Avenue, southeasterly to the point of Commencement. Containing 1.93 acres more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel No. 1 is \$1723.22.

That Parcel No. 2 contains that area shown on the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association, and delineated upon said Map as Streets and Avenues, and is more particularly described as follows: [72]

"All those certain streets and avenues lying within an area bounded on the north by the 'Stanford' patent line and the northeasterly line of Oakdale Avenue; on the east by the Water Line Front; on the south by the southwesterly line of Shafter Avenue, the southeasterly line of Alvord Street and the southwesterly line of Wallace Avenue and on the west by the southeasterly line of Donahue Street. Containing 63.15 acres, more or less."

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #2 is \$56,384.10.

That Parcel #3A contains that area within Tide Block 733, as the same is delineated upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water", and is more particularly described as follows:

"All of Block 733, as said Block is shown on that certain map entitled 'Map of the Salt Marsh and Tide Lands Lying Under Water' adopted by the Board of Tide Land Commis-

sioners on March 19, 1869, said block also being known as City and County of San Francisco Assessors Block No. 4781. Containing 2.80 acres more or less."

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #3A is \$2500.01.

That Parcel #3B contains that area within Tide Block 734 as the same is delineated upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water", and is more particularly described as follows:

"All of Block 34, as said Block is shown on that certain Map entitled 'Map of Salt Marsh and Tide Lands and Lands Lying Under Water' adopted by the Board of Tide Land Commissioners on March 19, 1869, said block also being known as City and County of San Francisco Assessors' Block No. 4798. Containing 2.80 acres more or less."

That the reasonable market value of the lands exclusive of minerals and mineral rights, contained in Parcel #3B is \$2500.01. [73]

That a copy of the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" is attached hereto, marked Exhibit "B" and made a part hereof by reference. That the said Exhibit "B" shows the line of the "Stanford" patent, hereinbefore referred to, and shows, delineated in Blue (Parcel # 1), Red (Parcel 2) and Yellow (Parcels 3A and 3B), the areas owned by the defendant, State of California.

Wherefore, said defendant, State of California, prays:

(1) That the Court assess the sum of \$63,069.43 and award the same to the defendant, State of California, as compensation for the taking of its interest, exclusive of minerals and mineral rights in the said premises, in the land subject to this suit;

(2) That the Court adjudge the defendant, State of California, the owner of the sub-surface estate in the minerals and mineral rights;

(3) That the Order granting immediate possession and use of the lands herein, heretofore made on the 25th day of July, 1942, to such extent be modified;

(4) That the Court grant such other and further relief as may be meet and proper in the premises.

ROBERT W. KENNY,

Attorney General, State of
California.

/s/ By JOHN F. HASSLER, JR.,

Deputy Attorney General,
Attorneys for Defendant,
State of California.

Receipt of copy of the within Answer is hereby admitted this 26th day of December, 1943.

/s/ M. MITCHELL BOURQUIN,
(DAR)

Special Assistant to the
Attorney General.

Attorney for Plaintiff.

[Endorsed]: Filed Dec. 21, 1943. [75]

No. 1177

Division of State Lands, State Lands Commission,
State of California, Sacramento

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of a resolution unanimously passed by the State Lands Commission at a meeting held in Sacramento November 4, 1943, on file in the office of the State Lands Commission; that said copy has been compared by the undersigned with the original, and is a correct transcript therefrom.

In Witness Whereof, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 17th day of December, A. D. 1943.

[Seal] /s/ CARLYLE F. LYNTON,
Executive Officer, State
Lands Commission. [76]

EXHIBIT "A"

RESOLUTION

Whereas, the Sovereign State of California has in many instances in the past conveyed by grant, deed or under court decree lands belonging to the Sovereign State of California and,

Whereas, the Sovereign State of California has failed in most instances to reserve to the Sovereign State of California, the mineral which might have been contained in such conveyed lands, and,

Whereas, the people of the Sovereign State of California have been deprived of revenue which might have accrued to their benefit had such minerals been reserved, and

Whereas, Section 6401 of the Public Resources Code of the State of California specifically provides for a reservation to the Sovereign State of California of all mineral deposit in lands belonging to the State of California,

Now Therefore Be It Resolved, that the State Lands Commission does hereby record itself as being opposed to any further conveyance of State Lands to the Federal Government without insisting upon reserving to the State of California, the minerals which might be contained therein, and

Be It Further Resolved, that the Executive Officer of the State Lands Commission be instructed to present to the Honorable Robert W. Kenny, Attorney General of the State of California, a copy of this resolution together with a request that the Attorney General's office from this date henceforth shall demand reservation to the Sovereign State of California of all deposits of coal, phosphate, sodium, gold, silver, oil, gas, oil shale, or other hydrocarbons and all other mineral deposits which might be contained within any State Lands which the Federal Government seeks to condemn or otherwise acquire.

November 4, 1943.

/s/ JOHN F. HASSLER,

Chairman, State Lands

Commission. [77]

In the District Court of the United States in and
For the Northern District of California, South-
ern Division

No. 22261-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

193 acres of land, City and County of San Fran-
cisco, State of California, MATILDA PRIOR
ANDREWS II, et al.,

Defendants.

AMENDMENT TO COMPLAINT

Now comes the United States of America, by M. Mitchell Bourquin, Special Assistant to the Attorney General, and, as of course, files this Amendment to Complaint, and alleges as follows:

Amends Paragraph X of said Complaint by deleting said paragraph contained therein, and inserting in its place and stead the following:

“X.

That the defendants, City and County of San Francisco and State of California, may have or claim some interest or lien in or to the following described lands:

Parcel 52

All that real property situate in the City and County of San Francisco, State of California, described as follows:

Commencing at the point of intersection of the southwesterly line of Revere Avenue and

the Southeasterly line of Coleman Street; running thence southeasterly and along said line of [78] Revere Avenue 600 feet to the northwesterly line of Boalt Street; thence at a right angle southwesterly along said line of Boalt Street 200 feet to the northeasterly line of Shafter Avenue; thence at a right angle northwesterly along said line of Shafter Avenue 600 feet to the southeasterly line of Coleman Street; thence at a right angle northeasterly along said line of Coleman Street 200 feet to the point of commencement.

Being all of Block No. 733 Tide Lands.

Parcel 60

All that real property situate in the City and County of San Francisco, State of California, described as follows:

Commencing at the point of intersection of the southwesterly line of Shafter Avenue and the southeasterly line of Coleman Street; running thence southeasterly and along said line of Shafter Avenue 600 feet to the northwesterly line of Boalt Street; thence at a right angle southwesterly along said line of Boalt Street 200 feet to the northeasterly line of Thomas Avenue; thence at a right angle northwesterly along said line of Thomas Avenue 600 feet to the southeasterly line of Coleman Street; thence at a right angle northeasterly along said line of Coleman Street 200 feet to the point of commencement.

Being all of Block No. 734 Tide Lands.”

Wherefore, plaintiff prays Judgment as prayed for in the Complaint on file herein.

/s/ MITCHELL BOURQUIN,
Special Assistant to the
Attorney General.
Attorney for Plaintiff. [79]

VERIFICATION

United States of America,
Northern District of California,
City and County of San Francisco—ss.

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States and attorney for the plaintiff in the above entitled action; that he has read the foregoing Complaint in Condemnation and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on his information or belief, and as to those matters that he believes it to be true;

That the reason this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign;

That the sources of affiant's information and the grounds for his belief are the official communications, records, files and documents received from

the Attorney General of the United States and from
Navy Department of the United States.

/s/ M. MITCHELL BOURQUIN,

Subscribed and sworn to before me this 11th day
of April, 1945.

[Seal] LOUIS V. VASQUEZ,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 4, 1947.

[Endorsed]: Filed April 17, 1945. [80] .

In the District Court of the United States, in and
For the Northern District of California, South-
ern Division

No. 22261 W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

193 Acres of land, City and County of San Fran-
cisco, State of California, et al.,

Defendants.

AMENDED ANSWER OF DEFENDANT,
STATE OF CALIFORNIA

Comes now the defendant, State of California,
one of the defendants in the above action, and for

answer to plaintiff's complaint herein, affirms, denies and alleges as follows:

I.

Denies all the allegations contained in paragraph I of plaintiff's complaint herein.

II.

Denies the allegations contained in paragraph II of plaintiff's complaint herein, and in this connection alleges:

That it is not necessary, for the purposes mentioned in said paragraph II, to acquire the subsurface estate, consisting of the mineral and mineral rights, in and to the property condemned herein; that the acts referred to in said [81] paragraphs I and II of the complaint herein do not authorize the condemnation or taking of minerals and mineral rights in property where such taking or condemnation is not essential to the uses and purposes for which the property is condemned.

That Section 6401 of the Public Resources Code of the State of California provides that in the disposal of all tide and submerged lands, belonging to the State of California, there be reserved to the State the mineral deposits and mineral rights in lands authorized to be sold.

That on November 4, 1943, the State Lands Commission adopted a resolution requiring that reservation to the State be made of all deposits of minerals and mineral rights. A certified copy of said resolu-

tion is attached to the Answer of defendant, State of California as Exhibit "A" and is by this reference incorporated herein.

III.

Denies the allegations of paragraph III of plaintiff's complaint herein.

IV.

Admits as alleged in paragraph IV that the estate or interest which plaintiff seeks to condemn in the lands described in the complaint is the fee simple title thereto, but in this connection this defendant alleges that such estate or interest is not necessary for the purposes mentioned in paragraphs I and II of the complaint; that it is not necessary to condemn the minerals and mineral rights in said described lands.

V.

Respecting the allegations contained in paragraph V of plaintiff's complaint herein, defendant, State of California has no information or belief upon the subject, and, placing its denial upon said ground, denies the allegations thereof. [82]

VI.

Admits the allegations of paragraph VI of plaintiff's complaint herein.

VII.

Admits that the defendant, State of California, has and claims an interest in the property subject

to suit, as alleged in paragraph IX of plaintiff's complaint herein, and in this connection alleges:

That prior to September 9, 1850, a portion of the lands subject to this action were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date California was admitted into and became a member of the Union of States upon an equal footing with the original States, in all respects, and thereupon and by that fact acquired title to all such tide and submerged lands. That thereafter, and on June 20, 1863, the defendant, State of California, acting through its Governor, Leland Stanford, conveyed by patent to the South San Francisco Homestead and Railroad Association certain of the said tide and submerged lands; that said patent was recorded in the office of the Recorder of the City and County of San Francisco in Liber 1 of Patents, at page 44; that said patent is hereinafter, for convenience, referred to as the "Stanford" patent. That thereafter, and on March 30, 1868, the Legislature of the State of California enacted "An Act to Survey and Dispose of Certain Salt Marsh and Tide Lands Belonging to the State of California". That said Act created a Board of Tide Land Commissioners and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide. That after the completion of such preliminary survey, the said Board

was [83] directed to establish the Water Line Front of San Francisco, and cause all the property belonging to the State lying South of Second Street within the City and County to be surveyed into lots and blocks with reservations of so much thereof for streets, docks, piers, slips, canals, drains or other uses necessary for the public convenience and purposes of commerce as the said Board deemed required. That the said Act further authorized and directed the said Board to prepare maps of the area as re-surveyed, and to cause the lots as so established to be sold at public auction. That pursuant to said Act the said Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water", which Map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869. That the said "Stanford" patent, hereinbefore referred to, granted to the said South San Francisco Homestead and Railroad Association certain swamp and overflow, tide and submerged lands in addition to and Bayward of the lands delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" as the property of said South San Francisco Homestead and Railroad Association. That the said survey established, within 24 feet of water at the lowest stage of the tide, the Water Line Front; which said Water Line Front coincided with the easterly line of Water Front Street, as delineated on said Map. That the said Board of Tide Land Commissioners, by resolution duly made and recorded, reserved and dedi-

cated certain market places and produce exchanges; that among such market places were those areas delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" as Tide Blocks 733 and 734. That said Tide Blocks 733 and 734 have never been conveyed by the defendant, State of California, the Board of Tide Land Commissioners, or any officer or department acting for or in behalf [84] of either said defendant, State of California, or said Board of Tide Land Commissioners. That there were also laid out and established by said survey blocks and lots surrounded by areas delineated upon the said Map as Streets and Avenues. That said Map contains a certification that said Map correctly exhibits the Water Line Front of the City and County of San Francisco, together with reservations for streets, docks, piers, slips, canals, basins and other uses necessary for public convenience and purposes of commerce; that none of the lands lying outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association and within the areas designated as Streets and Avenues upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" has ever been conveyed or dedicated by the State of California, by the State Board of Tide Land Commissioners, or by any municipal corporation, pursuant to authority of the defendant, State of California, or otherwise. That about the year 1890 the Harbor Line Board of the United States Engineers established the present United States Bulkhead Line; that said

Bulkhead Line lies Bayward of said Water Line Front and easterly line of Water Front Street. That none of the said tide and submerged lands situated between the said Water Line Front and easterly line of Water Front Street and the said United States Bulkhead Line has ever been conveyed by the State of California.

That the description in plaintiff's complaint herein embraces the following lands:

(1) The lands lying Bayward of Water Line Front and the easterly line of Water Front Street and situated between such line and the United States Bulkhead Line;

(2) The lands lying outside the line of the "Stanford" patent and delineated upon the "Map of [85] Salt Marsh and Tide Lands and Lands Lying Under Water" as Streets and Avenues.

(3) The lands lying within Tide Blocks 733 and 734, as the same are delineated upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water."

That the defendant, State of California, is the owner of and was, at the time of the filing of the complaint herein, entitled to the possession of such lands.

That the lands above referred to are hereinafter referred to as Parcels #1, #2, #3A and #3B.

That Parcel #1 contains that area lying Bayward of the line of the Water Line Front and

easterly line of Water Front Street and situate between such Water Line Front and the United States Bulkhead Line, and is more particularly described as follows:

“Commencing at the intersection of the United States Bulkhead Line with the southeasterly extension of the northeasterly line of Oakdale Avenue; thence southerly along said United States Bulkhead Line to its intersection with the southeasterly extension of the southwesterly line of Shafter Avenue; thence northwesterly along said southeasterly extension of the southwesterly line of Shafter Avenue to the southerly line of Water Front Street; thence along the southerly and easterly line of Water Front Street northerly to said southeasterly extension of the northeasterly line of Oakdale Avenue; thence along said southeasterly extension of the northeasterly line of Oakdale Avenue, southeasterly to the point of Commencement. Containing 1.884 acres more or less.”

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #1 is \$1685.31.

That Parcel #2 contains that area shown on the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water”, outside the line of the “Stanford” patent to the South San Francisco Homestead and Railroad Association, and delineated [86]

upon said Map as Streets and Avenues, and is more particularly described as follows:

“All those certain streets and avenues lying within an area bounded on the north by the ‘Stanford’ patent line and the northeasterly line of Oakdale Avenue; on the east by the Water Line Front; on the south by the southwesterly line of Shafter Avenue, the southeasterly line of Alvord Street and the southwesterly line of Wallace Avenue and on the west by the southeasterly line of Donahue Street. Containing 64.61 acres, more or less.”

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #2 is \$56,384.10.

That Parcel #3A contains that area within Tide Block 733, as the same is delineated upon the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water”, and is more particularly described as follows:

“All of Block 733, as said Block is shown on that certain map entitled ‘Map of The Salt Marsh and Tide Lands and Lands Lying Under Water’ adopted by the Board of Tide Land Commissioners on March 19, 1869, said block also being known as City and County of San Francisco Assessors Block No. 4781. Containing 2.80 acres more or less.”

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel #3A is \$2500.01.

That Parcel #3B contains that area within Tide Block 734 as the same is delineated upon the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water”, and is more particularly described as follows:

“All of Block 734, as said Block is shown on that certain Map entitled ‘Map of Salt Marsh and Tide Lands and Lands Lying Under Water’ adopted by the Board of Tide Land Commissioners on March 19, 1869, said block also being known as City and County of San Francisco Assessors’ Block No. 4798. Containing 2.80 acres more or less.”

That the reasonable market value of the lands exclusive of minerals and mineral rights, contained in Parcel #3B [87] is \$2500.01.

That a copy of the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water” is attached as Exhibit “B” to the Answer of defendant, State of California, and is by this reference incorporated herein. That the said Exhibit “B” shows the line of the “Stanford” patent, hereinbefore referred to, and shows, delineated in Blue (Parcel #1) Red (Parcel 2) and Yellow (Parcels 3A and 3B), the areas owned by the defendant, State of California.

Wherefore, said defendant, State of California, prays:

(1) That the Court assess the sum of \$63,069.43 and award the same to the defendant, State of Cali-

fornia, as compensation for the taking of its interest, exclusive of minerals and mineral rights in the said premises, in the land subject to this suit;

(2) That the Court adjudge the defendant, State of California, the owner of the sub-surface estate in the minerals and mineral rights;

(3) That the Order granting immediate possession and use of the lands herein, heretofore made on the 25th day of July, 1942, to such extent be modified;

(4) That the Court grant such other and further relief as may be meet and proper in the premises.

ROBERT W. KENNY,

Attorney General of the State
of California.

/s/ HAROLD B. HAAS,

Deputy Attorney General

/s/ MIRIAM E. WOLFF,

Deputy Attorney General,
Attorneys for defendant,
State of California.

[Affidavit of Service by Mail.]

[Endorsed]: Filed: Jun. 21, 1946. [88]

[Title of District Court and Cause.]

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above entitled action was consolidated for trial with United States vs. 193 acres of land in

the City and County of San Francisco, State of California, Civil 22261-R and United States vs. Certain land in the City and County of San Francisco, State of California, Civil No. 22416-R, and came on for hearing the 25th day of June, 1946, before the above entitled Court, the Honorable Michael J. Roche presiding, a jury having been waived by all parties, the cause having been duly and regularly continued to June 26, 1946, for further hearing and M. Mitchell Bourquin, Special Assistant to the Attorney General, John J. Healy, Jr. and J. Harold Weise, Special Attorneys appearing for the plaintiff, United States of America, and Robert W. Kenny, Attorney General of the State of California, Harold B. Haas and Miriam E. Wolff, Deputies Attorney General, appearing for the State of [89] California, and the evidence having been duly taken and heard and the cause submitted for decision, the Court makes and files its Findings of Fact and Conclusions of Law as follows:

I.

That the Complaint in the above entitled action was filed on July 25, 1942, and that the plaintiff in the above entitled action is the United States of America and brings said action pursuant to and under the provisions contained in the act of Congress approved January 29, 1942 (Public Law 420, 77th Congress, 56 Stat. Chap. 25) and the act of Congress approved February 7, 1942 (Public Law 441, 77th Congress, 56 Stat., Chap. 46) appropriated funds therefor.

II.

That the lands hereinafter described are taken and condemned under the authority of the above mentioned acts of Congress for the uses and purposes authorized by said acts and are taken and condemned for use in connection with the establishment of the Naval Drydocks, Hunters Point, San Francisco, California, and are suitable and necessary for said purpose; that said use of said lands constitutes a public use and that the acquisition of said lands by plaintiff is of the greatest public benefit and the *leasr* private injury.

III.

That service has been properly made upon all persons interested in said lands hereinafter described:

IV.

That prior to September 9, 1850, the lands subject of this trial were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date, California was admitted into and became a member of the [90] union of states, upon an equal footing with the original states in all respects, and thereupon and by that fact acquired title to all tide and submerged lands involved in this trial; that the Act of 1868 (Ststs. of Cal. 1867-68, Page 716) created a Board of Tide Land Commissioners, and authorized and directed the said Board to take possession of all the salt marsh and tide

lands and lands lying under water, situated in the City and County of San Francisco, and to cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide; that after the completion of such preliminary survey, the Board was directed to establish the Water Line Front of San Francisco, and cause all of the property belonging to the State lying south of Second Street, within the said County to be surveyed into lots and blocks.

That the said Act further authorized and directed the said Board to prepare maps of the area as re-surveyed and to cause the lots as so established to be sold at public auction; that pursuant to said Act, the Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869.

That none of the land claimed by the State of California in this action had been reclaimed at the time said action was commenced and that all of the land so claimed was tide or submerged lands.

V.

That pursuant to said statute, said Tide Land Commissioners sold, at public auction, all the right, title, and interest of defendant, State of California, in and to the property in said lots exhibited on said map and said sales were by lots in accordance with said survey and map. [91]

VI.

That Parcel 2, hereinafter described, embraces and is a portion of certain streets and alleys exhibited and delineated upon said map, "Map of Salt Marsh and Tide Lands and Lands Lying Under Water."

VII.

That the interest or title that defendant, State of California, retained in said Parcel 2 was retained only for the purpose of providing ingress and egress to said lots sold and that the interest or title of defendant, State of California, in and to said parcel at the date of the taking herein was subject to easements for access to and from said lots exhibited and delineated upon said survey and map.

VIII.

That said Parcel 2 is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

"All those certain streets and avenues lying within an area bounded on the north by the "Stanford" patent line and the northeasterly line of Oakdale Avenue; on the east by the Water Line Front; on the south by the southwesterly line of Shafter Avenue, the southeasterly line of Alvord Street and the southwesterly line of Wallace Avenue and on the west by the southeasterly line of Donahue Street. Containing 64.61 acres, more or less."

That just compensation for said parcel including any and all damages to the larger tract of which said Parcel 2 is a part is the sum of One and No/100 Dollar (\$1.00).

IX.

Except as hereinbefore more particularly set forth all of the allegations, the Plaintiff's Complaint are true.

X.

Except as hereinbefore more particularly set forth all the allegations of the answer amended answer of [92] defendant, State of California, are not true.

Conclusions of Law

I.

That the Court has jurisdiction of the parties and the subject matter of this action.

II.

That the use for which the property is taken is a public use of the United States and that the United States is authorized by law to acquire the same by condemnation.

III.

That the damage suffered by the State of California for the taking of Parcel 2 is the sum of One and No/100 Dollar (\$1.00).

IV.

That a Judgment of Condemnation in the form provided by law shall be made and entered herein.

V.

Let Judgment be entered accordingly.

Done in Open Court, this 22nd day of January, 1947.

MICHAEL J. ROCHE,
Judge.

Receipt of the foregoing Findings of Fact and Conclusions of Law is hereby acknowledged this 12th day of December, 1946.

ROBERT W. KENNY,
Attorney General of the
State of California.

By HAROLD B. HAAS,
Deputy Attorney General,
Attorney for Defendant
State of California.

[Endorsed]: Filed Jan. 22, 1947. [93]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 2261-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

193 ACRES OF LAND, City and County of San
Francisco, State of California, MATILDA
PRIOR ANDREWS II, et al.,

Defendants.

PRELIMINARY JUDGMENT AS TO
PARCEL 2

The above entitled action was consolidated for trial with United States vs. 193 Acres of land in the City and County of San Francisco, State of California, Civil 2261-R and United States vs. Certain land in the City and County of San Francisco, State of California, Civil No. 22416-R, and came on for hearing the 25th day of June, 1946, before the above entitled Court, the Honorable Michael J. Roche presiding, a jury having been waived by all parties, the cause having been duly and regularly continued to June 26, 1946, for further hearing and M. Mitchell Bourquin, Special Assistant to the Attorney General, John J. Healy, Jr. and J. Harold Weise, Special Attorneys appearing for the plaintiff, United States of America, and Robert W.

Kenny, Attorney General of the State of California, Harold B. Haas and Miriam E. Wolff, Deputies Attorney General, appearing for the State of California, and evidence, both oral and documentary, having been introduced by the parties hereto and the case having [94] been fully tried and presented to the Court, and briefs having been submitted by the respective parties and the Cause having been submitted for decision on the 19th day of October, 1946, and the Court having heretofore filed its written Findings of Fact and Conclusions of Law;

Wherefore, by reason of the law and the findings herein.

It Is Hereby Ordered, Adjudged and Decreed:

I.

That title to Parcel 2, the subject of the above entitled action, will vest in the United States of America in fee simple absolute upon the deposit in the Registry of this Court of the compensation therefore herein awarded.

II.

That said Parcel 2 is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the north by the "Stanford" patent line and the northeasterly line of Oakdale Avenue; on the east by the

Water Line Front; on the south by the southwesterly line of Shafter Avenue, the southeasterly line of Alvord Street and the southwesterly line of Wallace Avenue and on the west by the southeasterly line of Donahue Street. Containing 64.61 acres, more or less.

III.

That defendant State of California is awarded the sum of One Dollar (\$1.00) for said Parcel 2 together with interest from the date of the entry of this Judgment until paid.

Done in Open Court, this 22nd day of January, 1947.

LOUIS E. GOODMAN,
Judge.

Approved as to form:

FRED N. HOWSER,
Attorney General of the
State of California.

By MIRIAM E. WOLFF,
Deputy Attorney General,
Attorney for the State of
California.

[Endorsed]: Filed and Entered Jan. 22, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Michael J. Roche, Judge of the District Court of the United States, Southern Division, Northern District of California and to M. Mitchell Bourquin, Esq., Special Assistant to the Attorney General, and John J. Healy, Jr., and J. Harold Weise, Esqs., Attorneys for Plaintiff:

You and each of you will please take notice that the defendant, State of California, hereby appeals to the United States Circuit Court of Appeals, Ninth Judicial District, from that portion of the preliminary judgment as to parcel 2 therein awarding defendant, State of California, the sum of One Dollar for its interest therein and denying defendant, State of California, any further or additional compensation for the taking of said property.

Dated: April 21, 1947.

/s/ FRED N. HOWSER,
Attorney General.

/s/ HAROLD B. HAAS,
Deputy Attorney General.

/s/ MIRIAM E. WOLFF,
Deputy Attorney General.

[Affidavit of Service by Mail.]

[Endorsed]: Filed: Apr. 21, 1947 [96]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That Pacific Indemnity Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and duly licensed to transact a surety business in the State of California, is held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to be paid unto said United States of America, for which payment well and truly to be made Pacific Indemnity Company binds itself, its successors and assigns firmly by these presents.

Signed, Sealed and Dated This 10th Day of March, 1947.

The condition of the above obligation is such that [97] whereas State of California, defendant in the above entitled cause, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled court entered in said cause on the 22nd day of January, 1947;

Now, Therefore the condition of the above obligation is such that is the said appellant, State of California, shall pay all costs if the said appeal is dismissed or the said judgment affirmed, or such costs as the appellate court may award if the said judgment is modified, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

It Is Further Stipulated as a part of the foregoing bond that in case of a breach of any condition thereof, the above named District Court may, upon notice to said surety of not less than ten days, proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and award execution therefor.

PACIFIC INDEMNITY
COMPANY,

[Seal] By R. L. TRAVISS,
Attorney in Fact.

State of California,
City and County of
San Francisco—ss:

On this 10th day of March in the year one thousand nine hundred and forty-seven before me, Emily K. McCorry, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. L. Traviss, known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. L. Traviss acknowledged to me that he subscribed the name of Pacific Indemnity Company thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 21, 1950.

[Endorsed]: Filed: Apr. 21, 1947.

[Title of District Court and Cause.]

**ORDER FOR TRANSMISSION OF EXHIBITS
TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT**

It appearing to the court that the exhibits in the above entitled matter consist of maps, diagrams and original papers, not capable of reproduction in the printed record,

Now, Therefore, It Is Hereby Ordered that copies of the original papers and exhibits which were introduced in evidence during the trial of said cause need not be copied in the Record of Appeal in said cause to be filed in connection with the appeal of said defendant and appellant, and that all original papers and exhibits introduced in evidence at the trial of said cause in the above entitled court by plaintiff, United States of America, and defendant, State of California, with respect to Parcel 2, together with all the original papers and exhibits

introduced in evidence at the trial of said action with respect to Parcels 3-A and 3-B of action 22147-R and Parcel 2 of action 22416-R, which actions were consolidated with the above entitled action for the purposes of trial, may be transferred and transmitted in their original form to the court to which said appeal is taken, namely, the United States Circuit Court of Appeals for the Ninth Circuit; and

It Is Further Ordered that all such original papers and exhibits shall be included in and be a part of the Record on Appeal to the same effect as though copied therein.

It Is Further Ordered that the said exhibits and testimony introduced in evidence at the trial of Parcel 2 of the above entitled action were also introduced in evidence with reference to Parcels 3-A and 3-B of action 22147-R and Parcel 2 of action 22416-R, which actions were consolidated with the above entitled action for the purposes of trial, and that the original papers and exhibits, all of which are the subject of this Order, may be considered by the court with like effect with reference to Parcels 3-A and 3-B of action 22147-R and Parcel 2 of action 22416-R.

Dated: July 29, 1947.

GEORGE B. HARRIS,

Judge of the U. S. District
Court.

[Endorsed]: July 29, 1947. [102]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Comes Now Appellant, State of California, one of the defendants above named, and states that its appeal is from that portion of the judgment decreeing that the State of California is entitled to receive the sum of \$1.00 and no more for the taking of parcel 2, which was given, made and entered in the above-entitled cause on the 22nd day of January, 1947, and that said appellant will rely on its appeal herein on the following points.

I.

That the above-named United States District Court erred in finding that the interest or title that defendant, State of California, retained in said parcel 2 was retained [103] only for the purpose of providing ingress and egress to said lots sold.

II.

That the said Court erred in finding that the interest or title that defendant, State of California, retained in said parcel 2 at the date of the taking herein was subject to easements for access to and from said lots delineated upon said survey map.

III.

That the said Court erred in finding that just compensation for the taking of said parcel 2 is the sum of One and no/100 (\$1.00) Dollars.

IV.

That the said Court erred in not finding that said property was never laid out upon the grounds as streets.

V.

That the said Court erred in not finding and in not concluding that the said property was never opened nor declared open as streets.

VI.

That the said Court erred in not finding and in not concluding that the said property was never dedicated as streets.

VII.

That the said Court erred in not finding and in not concluding that the said property was not subjected to any easement as streets.

VIII.

That the said Court erred in rendering its decision and making and entering its judgment herein in that the evidence was and is insufficient to justify the judgment rendered by said court. [104]

IX.

That the said Court erred in rendering its decision and making and entering its judgment herein against the defendant, State of California, in that said judgment is contrary to the law and the facts.

X.

That the said Court erred in not making its judgment herein in favor of defendant, State of California, and against plaintiff United States of America in the sum of \$56,384.10.

Dated: June 15, 1947.

/s/ FRED N. HOWSER,

Attorney General of the
State of California.

/s/ HAROLD B. HAAS,

Deputy Attorney General.

/s/ MIRIAM E. WOLFF,

Deputy Attorney General,
Attorneys for Defendant,
State of California.

[Endorsed]: Filed Sept. 4, 1947. [105]

In the District Court of the United States in and
for the Northern District of California, Southern
Division

No. 22416-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN LAND IN THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALI-
FORNIA, WILLIAM HENRY ASH, et al.,
Defendants.

COMPLAINT IN CONDEMNATION

Comes now the Plaintiff, United States of Amer-
ica, by M. Mitchell Bourquin, Special Assistant to

the Attorney General, at the direction and under the authority of the Attorney General of the United States, and pursuant to the request of the Acting Secretary of the Navy of the United States, and for cause of action against the above-named defendants, alleges as follows:

I.

That this proceeding is instituted and the lands hereinafter described are taken and condemned pursuant to and under the provisions and authority of and for the purposes and uses authorized by the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and the Act of Congress approved February 7, 1942 (Public Law 441, 77th Congress).

II.

That the estate or interest which plaintiff seeks to take and condemn is the fee simple title to the lands hereinafter described, subject to existing public utility easements.

III.

That the lands hereinafter described have been selected by the Acting Secretary of the Navy of the United States for use in connection with the extension of the Naval Dry Docks, Hunters Point, San Francisco, California, and are sought to be taken and condemned for said purpose and use and are suitable and necessary therefor. That said use of said lands constitutes a public use and said lands are required for immediate use in order to carry out said purpose.

IV.

That the acquisition of said lands by plaintiff will be of the greatest public benefit and the least private injury; that no part of said lands has heretofore been appropriated for [109] public use by plaintiff or the State of California, or any political subdivision thereof.

V.

That there are sufficient funds now available with which plaintiff can and is authorized to pay just compensation for the lands sought to be taken and condemned herein in whatever sum may be ultimately awarded in this proceeding for the taking of said lands and any damages resulting therefrom.

VI.

That plaintiff is informed and believes and therefore alleges that the lands taken by this proceeding are not a part of any larger tract belonging to the apparent or purported owners of said land above described.

VII.

That the defendants First Doe to Thirtieth Doe, inclusive, and First Doe Corporation to Twentieth Doe Corporation, inclusive, are sued and designated herein by fictitious names for the reason that their true names are unknown to plaintiff, but the plaintiff will, upon ascertaining their true names, substitute the same for such fictitious names by appropriate amendment, and prays such leave of the

Court; that said defendants, and each of them, may have or claim to have an interest in some piece or parcel of the lands sought to be taken and condemned in this action, but that the nature, character or extent of such interest is unknown to plaintiff.

VIII.

That each of the defendants above named has or may have or claim some interest in the property hereinafter described, and are therefore joined as defendants.

IX.

That the land to be taken and condemned in this proceeding [110] is situate in the City and County of San Francisco, State of California, and is more particularly described as follows: [111]

Beginning at the point of intersection of the U. S. Bulkhead Line and the southeasterly line of Coleman Street; running thence southwesterly along said southeasterly line of Coleman Street to the intersection of said southeasterly line of Coleman Street and the southwesterly line of McKinnon Avenue; running thence northwesterly along the said southwesterly line of McKinnon Avenue to the intersection of said southwesterly line of McKinnon Avenue and the southeasterly line of Donahue Street; thence northeasterly along said southeasterly line of Donahue Street to the intersection of said southeasterly line of Donahue Street, with the

northeasterly line of Jerrold Avenue; thence southeasterly and along said line of Jerrold Avenue 75 feet; thence at a right angle northeasterly 100 feet; thence at a right angle northwesterly 75 feet to the southeasterly line of Donahue Street; running thence northeasterly along said southeasterly line of Donahue Street to the point of intersection of said southeasterly line of Donahue Street and the U. S. Bulkhead Line; running thence southeasterly along said U. S. Bulkhead Line to the point of commencement. [112]

X.

That a state of war now exists between the Plaintiff and certain foreign governments, and pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), the Plaintiff, upon the filing of this Complaint, becomes entitled to the right to take immediate possession of the above-described lands.

That the Acting Secretary of the Navy of the United States has determined that it is necessary that an order be obtained authorizing the United States of America to take immediate possession of said lands to the extent of the interest above described, and the above-mentioned Special Assistant to the Attorney General has been directed by the Attorney General of the United States to take proper proceedings herein to secure such orders from this Honorable Court.

Wherefore, Plaintiff prays:

1. For an order authorizing the United States to take immediate possession of the above-described lands.

2. For judgment:

(a) Decreeing that said lands above described, to the extent of the title and interest which Plaintiff seeks to acquire by this action, are condemned for necessary public uses of the Plaintiff as authorized by law; that all of said lands are necessary and suitable thereto;

(b) Determining the value of the lands subject of this action and each separate interest therein, and directing the payment for each separate interest to the persons entitled thereto.

3. For such other and further relief as the Court shall deem meet and proper in the premises.

/s/ M. MITCHELL BOURQUIN,

Special Assistant to the
Attorney General.

Attorney for Plaintiff. [114]

VERIFICATION

United States of America,
Northern District of California,
City and County of San Francisco—ss.

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States and attorney for the

plaintiff in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

That the reason this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign.

That the sources of affiant's information and the grounds for his belief are the official communications, records, files and documents received from the Attorney General of the United States and from the Acting Secretary of the Navy of the United States.

/s/ M. MITCHELL BOURQUIN,

Subscribed and sworn to before me this 24th day of December, 1942.

[Seal] /s/ LOUIS O. VASQUEZ,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires December 4, 1943.

[Endorsed]: Filed Dec. 24, 1942. [115]

[Title of District Court and Cause.]

ORDER FOR IMMEDIATE POSSESSION

It appearing from the Complaint on file herein that application has been made by plaintiff to be granted immediate possession of the lands subject of this action, and good cause appearing therefor,

It Is Hereby Ordered that the United States of America be, and it is hereby granted leave to take immediate possession of said land and property, and to use said land and property to the extent prayed for, and for the purposes alleged in said Complaint, and to proceed thereon with the authorized public works of the United States.

It Is Further Ordered that the Defendants and all other persons in possession of said property are hereby directed to deliver immediate possession thereof to the United States and its agents, and the United States Marshal is directed to place [116] and maintain plaintiff in possession of said property.

The Court reserves the right to make such other and further orders and decrees as may be necessary in the premises.

And It Further Appearing that Plaintiff has made adequate provision for the payment of just compensation for the taking of said land and property, it shall not be necessary for the plaintiff to deposit any money or other security for the purpose of securing payment to the parties entitled thereto.

The land and property subject of this Order is situate in the City and County of San Francisco, State of California, and is described as follows:

Beginning at the point of intersection of the U. S. Bulkhead Line and the southeasterly line of Coleman Street; running thence southwesterly along said southeasterly line of Coleman Street to the intersection of said southeasterly

line of Coleman Street and the southwesterly line of McKinnon Avenue; running thence northwesterly along the said southwesterly line of McKinnon Avenue to the intersection of said southwesterly line of McKinnon Avenue and the southeasterly line of Donahue Street; thence northeasterly along said southeasterly line of Donahue Street to the intersection of said southeasterly line of Donahue Street, with the northeasterly line of Jerrold Avenue; thence southeasterly and along said line of Jerrold Avenue 75 feet; thence at a right angle northeasterly 100 feet; thence at a right angle northwesterly 75 feet to the southeasterly line of Donahue Street; running thence northeasterly along said southeasterly line of Donahue Street to the point of intersection of said southeasterly line of Donahue Street and the U. S. Bulkhead Line; running thence southeasterly along said U. S. Bulkhead Line to the point of commencement.

Done in open Court this 24th day of December, 1942.

/s/ A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 24, 1942. [118]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division.

No. 22416-R

UNITED STATES OF AMERICA

Plaintiff,

vs.

CERTAIN LAND IN THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALI-
FORNIA, et al.,

Defendants.

ANSWER OF DEFENDANT, STATE OF
CALIFORNIA

Comes Now the defendant, State of California,
one of the defendants in the above action, and for
answer to plaintiff's complaint herein, affirms, de-
nies and alleges as follows:

I.

Denies the allegations contained in Paragraph I
of plaintiff's complaint herein.

II.

Admits as alleged in paragraph II of plaintiff's
complaint herein that the estate or interest which
plaintiff seeks to condemn in the lands described in
the complaint is the fee simple title thereto, subject
to existing public utility easements, and in this con-
nection this defendant alleges that such an estate or

interest is not necessary for the purposes [119] mentioned in paragraph III of the complaint; that it is not necessary to condemn the minerals and mineral rights in said described lands.

III.

Denies the allegations contained in Paragraph III of plaintiff's complaint herein, and in this connection alleges: That it is not necessary for the purposes mentioned in said paragraph III to acquire the sub-surface estate consisting of the mineral and mineral rights in and to the property condemned herein; that the acts referred to in said paragraph I of the complaint herein do not authorize the condemnation or taking of minerals and mineral rights in property where such taking or condemnation is not essential to the uses and purposes for which the property is condemned.

That Section 6401 of the Public Resources Code of the State of California provides that in the disposal of all tide and submerged lands belonging to the State of California, there be reserved to the State the mineral deposits and mineral rights in lands authorized to be sold.

That on November 4, 1943, the State Lands Commission adopted a resolution requiring that reservation to the State be made of all deposits of minerals and mineral rights. A certified copy of said resolution is attached hereto and made a part hereof and for reference is marked Exhibit "A".

IV.

Denies the allegations of paragraph IV of plaintiff's complaint herein.

V.

Respecting the allegations in Paragraph V of plaintiff's complaint herein, defendant, State of California, has no information or belief upon the subject and placing its denial upon said ground, denies the allegations therein contained. [120]

VI.

Admits that the defendant, State of California, has and claims an interest in the property subject to suit as alleged in paragraph VIII of plaintiff's complaint herein and in this connection alleges:

That prior to September 9, 1850, a portion of the lands subject to this action were tide and submerged lands covered by waters of the Bay of San Francisco; that on said date California was admitted into and became a member of the United States upon an equal footing with the original States, in all respects, and thereupon and by that fact acquired title to all such tide and submerged lands. That thereafter, and on June 20, 1863, the defendant, State of California, acting through its Governor, Leland Stanford, conveyed by patent to the South San Francisco Homestead and Railroad Association certain of the said tide and submerged lands; that said patent was recorded in the office of The Recorder of the City and County of San Francisco in

Liber 1 of Patents, at page 44; that said patent is hereinafter for convenience referred to as the "Stanford" Patent; that thereafter and on March 30, 1868, the Legislature of the State of California enacted "An Act to Survey and Dispose of Certain Salt Marsh and Tide Lands Belonging to the State of California." That said Act created a Board of Tide Land Commissioners and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide. That after the completion of such preliminary survey, the said Board was directed to establish the Water Line Front of San Francisco, and cause all the property belonging to the State lying South of Second Street within the City and County to be surveyed into lots and blocks with reservations of so much thereof for streets, docks, piers, slips, canals, drains or other [121] uses necessary for the public convenience and purposes of commerce as the said Board deemed required. That the said Act further authorized and directed the said Board to prepare maps of the area as re-surveyed, and to cause the lots as so established to be sold at public auction. That pursuant to said Act the said Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water", which Map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869. That the said "Stanford" patent,

hereinbefore referred to, granted to the said South San Francisco Homestead and Railroad Association certain swamp and overflow, tide and submerged lands in addition to and Bayward of the lands delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying under Water", as the property of the said South San Francisco Homestead and Railroad Association. That the said survey established, within 24 feet of water at the lowest stage of the tide, the Water Line Front; which said Water Line Front coincided with the easterly line of Water Front Street, as designated on said Map. That there were also laid out and established, by said survey, blocks and lots surrounded by areas delineated upon the said Map as Streets and Avenues. That said Map contains a certification that said Map correctly exhibits the Water Line Front of the City and County of San Francisco, together with reservations for streets, docks, piers, slips, canals, basins and other uses necessary for public convenience and purpose of commerce. That the northwest corner of Tide Block 72, as delineated on the "Map of Salt Marsh and Tide Lands and Lands lying under Water" to the extent that the lands therein lie Bayward of the "Stanford" Patent Line, has never been conveyed to the defendant State of California or by the said State Board of Tide Land Commissioners. That none of the [122] lands lying outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association and within the areas designated as Streets and Avenues upon the "Map of Salt Marsh and

Tide Lands and Lands Lying Under Water” has ever been conveyed or dedicated by the State of California, by the State Board of Tide Land Commissioners, or by any municipal corporation, pursuant to authority of the defendant, State of California, or otherwise. That about the year 1890 the Harbor Line Board of the United States Engineers established the present United States Bulkhead Line; that said Bulkhead Line lies Bayward of said Water Line Front and easterly line of Water Front Street. That none of the said tide and submerged lands situated between the said Water Line Front and easterly line of Water Front Street and the said United States Bulkhead Line has ever been conveyed by the State of California.

That the description in plaintiff’s complaint herein embraces the following lands:

(1) The Lands Lying Bayward of Water Line Front and the easterly line of Water Front Street and situated between such line and the United States Bulkhead Line;

(2) The Lands lying outside the line of the “Stanford” patent and delineated upon the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water” as Streets and Avenues.

(3) That portion of the Northwest corner of Tide Block 72, as delineated on the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water” which lies Bayward of the “Stanford” Patent Line.

That the lands above referred to are hereinafter referred to as Parcels No. 1, No. 2 and No. 3. [123]

That the said Parcel No. 1 comprises the area lying Bayward of the line of the Water Line Front and easterly line of Water Front Street and situate between such Water Line Front and the United States Bulkhead Line, and is more particularly described as follows:

“Commencing at the intersection of the northeasterly extension of the southeasterly line of Donahue Street and the United States Bulkhead Line; thence along said United States Bulkhead Line southeasterly to the northeasterly extension of the southeasterly line of Coleman Street; thence southwesterly along said northeasterly extension of the southeasterly line of Coleman Street to the northeasterly line of Water Front Street; thence **northwesterly** along said line of Water Front Street to said northeasterly extension of the southeasterly line of Donahue Street; thence northeasterly along said northeasterly extension to the point of Commencement. Containing 0.80 of an acre more or less.

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel No. 1 is \$714.29.

That Parcel No. 2 contains that area shown on the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water”, outside the line of the “Stanford” patent to the South San Francisco Home-

stead and Railroad Association, and delineated upon said Map as Streets and Avenues, and is more particularly described as follows:

“All those certain streets and avenues lying within an area bounded on the west by the southeasterly line of Donahue Street, on the north and east by the Water Line Front and the southeasterly line of Coleman Street and on the south by the “Stanford” patent line. Containing 9.24 acres more or less.”

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel No. 2 is \$8250.03.

That Parcel No. 3 contains the northwest corner, outside the “Stanford” Patent Line, of that area delineated upon the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water” as Tide Block 72, and is more particularly described as follows: [124]

“Commencing at the intersection of the southeasterly line of Donahue Street with the southwesterly line of Davidson Avenue; thence southeasterly along said southwesterly line of Davidson Avenue to the “Stanford” patent line; thence northwesterly along last said line to said southeasterly line of Donahue Street; thence northeasterly along said line of Donahue Street to the point of Commencement. Containing 0.07 of an acre more or less.”

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel No. 3 is \$62.50.

That a copy of the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" is attached hereto, marked Exhibit "B", and made a part hereof by reference. That the said Exhibit "B" shows the line of the "Stanford" patent, hereinbefore referred to, and shows, delineated in blue (Parcel 1), red (Parcel 2) and yellow (Parcel 3) the areas owned by the defendant, State of California.

Wherefore, said defendant, State of California, prays:

(1) That the Court assess the sum of \$9,026.82 and award the same to the defendant, State of California, as compensation for the taking of its interest, exclusive of minerals and mineral rights in the said premises, in the land subject to this suit;

(2) That the Court adjudge the defendant, State of California, the owner of the sub-surface estate in the minerals and mineral rights;

(3) That the Order granting immediate possession and use of the lands herein, heretofore made on the 24th day of December, 1942, to such extent be modified. [125]

(4) That the Court grant such other and further relief as may be meet and proper in the premises.

ROBERT W. KENNY,

Attorney General, State of
California,

/s/ By JOHN F. HASSLER, JR.,

Deputy Attorney General.

Attorneys for Defendant,
State of California.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Dec. 21, 1943, [126]

No. 1177

Division of State Lands, State Lands Commission,
State of California, Sacramento

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of a resolution unanimously passed by the State Lands Commission at a meeting held in Sacramento, November 4, 1943, on file in the office of the State Lands Commission; that said copy has been compared by the undersigned with the original, and is a correct transcript therefrom.

In Witness whereof, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 17th day of December, A.D., 1943.

[Seal] /s/ CARLYLE F. LYNTON,
Executive Officer State Lands
Commission. [127]

EXHIBIT "A"

RESOLUTION

Whereas, the Sovereign State of California has in many instances in the past conveyed by grant, deed or under court decree lands belonging to the Sovereign State of California and,

Whereas, the Sovereign State of California has failed in most instances to reserve to the Sovereign State of California, the mineral which might have been contained in such conveyed lands, and,

Whereas, the people of the Sovereign State of California have been deprived of revenue which might have accrued to their benefit had such minerals been reserved, and

Whereas, Section 6401 of the Public Resources Code of the State of California specifically provides for a reservation to the Sovereign State of California of all mineral deposit in lands belonging to the State of California,

Now, Therefore Be It Resolved, that the State Lands Commission does hereby record itself as being opposed to any further conveyance of State Lands to the Federal Government without insisting upon reserving to the State of California, the minerals which might be contained therein, and

Be It Further Resolved, that the Executive Officer of the State Lands Commission be instructed to present to the Honorable Robert W. Kenny, Attorney General of the State of California, a copy of this resolution together with a request that the Attorney General's office from this date henceforth shall demand reservation to the Sovereign State of California of all deposits of coal, phosphate, sodium, gold, silver, oil, gas, oil shale, or other hydrocarbons and all other mineral deposits which might be contained within any State Lands which the Federal Government seeks to condemn or otherwise acquire.

November 4, 1943.

/s/ JOHN F. HASSLER,
Chairman, State Lands
Commission. [128]

In the District Court of the United States in and for
the Northern District of California, Southern
Division

No. 22416 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN LAND IN THE CITY AND
COUNTY OF SAN FRANCISCO, STATE
OF CALIFORNIA, et al.,

Defendants.

AMENDED ANSWER OF DEFENDANT,
STATE OF CALIFORNIA

Comes now the defendant, State of California,
one of the defendants in the above action, and for
answer to plaintiff's complaint herein, affirms, de-
nies and alleges as follows:

I.

Denies the allegations contained in Paragraph I
of plaintiff's complaint herein.

II.

Admits as alleged in Paragraph II of plaintiff's
complaint herein that the estate or interest which
plaintiff seeks to condemn in the lands described
in the complaint is the fee simple title thereto, sub-
ject to existing public utility easements, and in this
connection this defendant alleges that such an estate
or interest is not necessary for the purposes men-

tioned in Paragraph III of the complaint; that it is not [129] necessary to condemn the minerals and mineral rights in said described lands.

III.

Denies the allegations contained in Paragraph III of plaintiff's complaint herein, and in this connection alleges: That it is not necessary for the purposes mentioned in said Paragraph III to acquire the sub-surface estate consisting of the mineral and mineral rights in and to the property condemned herein; that the acts referred to in said Paragraph I of the complaint herein do not authorize the condemnation or taking of minerals and mineral rights in property where such taking or condemnation is not essential to the uses and purposes for which the property is condemned.

That Section 6401 of the Public Resources Code of the State of California provides that in the disposal of all tide and submerged lands belonging to the State of California, there be reserved to the State the mineral deposits and mineral rights in lands authorized to be sold.

That on November 4, 1943, the State Lands Commission adopted a resolution requiring that reservation to the State be made of all deposits of minerals and mineral rights. A certified copy of said resolution is attached to the Answer of defendant, State of California as Exhibit "A" and is by this reference incorporated herein.

IV.

Denies the allegations of Paragraph IV of plaintiff's complaint herein.

V.

Respecting the allegations in Paragraph V of plaintiff's complaint herein, defendant, State of California, has no information or belief upon the subject and placing its denial upon said ground, denies the allegations therein contained. [130]

VI.

Admits that the defendant, State of California, has and claims an interest in the property subject to suit as alleged in paragraph VIII of plaintiff's complaint herein and in this connection alleges:

That prior to September 9, 1850, a portion of the lands subject to this action were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date California was admitted into and became a member of the Union of States upon an equal footing with the original States, in all respects, and thereupon and by that fact acquired title to all such tide and submerged lands. That thereafter, and on June 20, 1863, the defendant, State of California, acting through its Governor, Leland Stanford, conveyed by patent to the South San Francisco Homestead and Railroad Association certain of the said tide and submerged lands; that said patent was recorded in the office of The Recorder of the City and County of San Francisco in Liber 1 of Patents, at page 44; that said

patent is hereinafter for convenience referred to as the "Stanford" Patent; that thereafter and on March 30, 1868, the Legislature of the State of California enacted "An Act to Survey and Dispose of Certain Salt Marsh and Tide Lands Belonging to the State of California." That said Act created a Board of Tide Land Commissioners and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide. That after the completion of such preliminary survey, the said Board was directed to establish the Water Line Front of San Francisco, and cause all the property belonging to the State lying South of Second Street within the City and County to be surveyed into [131] lots and blocks with reservations of so much thereof for streets, docks, piers, slips, canals, drains or other uses necessary for the public convenience and purposes of commerce as the said Board deemed required. That the said Act further authorized and directed the said Board to prepare maps of the area as re-surveyed, and to cause the lots as so established to be sold at public auction. That pursuant to said Act the said Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which Map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869. That the said "Stanford" patent, hereinbefore referred to, granted to the said South

San Francisco Homestead and Railroad Association certain swamp and overflow, tide and submerged lands in addition to and Bayward of the lands delineated upon the said "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," as the property of the said South San Francisco Homestead and Railroad Association. That the said survey established, within 24 feet of water at the lowest stage of the tide, the Water Line Front; which said Water Line Front coincided with the easterly line of Water Front Street, as delineated on said Map. That there were also laid out and established, by said survey, blocks and lots surrounded by areas delineated upon the said Map as Streets and Avenues. That said Map contains a certification that said Map correctly exhibits the Water Line Front of the City and County of San Francisco, together with reservations for streets, docks, piers, slips, canals, basins and other uses necessary for public convenience and purposes of commerce. That the northwest corner of Tide Block 72, as delineated on the "Map of Salt Marsh and Tide Lands and Lands lying under Water" to the extent that the lands therein lie Bayward of the "Stanford" Patent Line, has never been conveyed by the defendant State of California or by the [132] said State Board of Tide Land Commissioners. That none of the lands lying outside the line of the "Stanford" patent to the South San Francisco Homestead and Railroad Association and within the areas designated as Streets and Avenues upon the "Map of Salt Marsh and Tide Lands and Lands

Lying Under Water” has ever been conveyed or dedicated by the State of California, by the State Board of Tide Land Commissioners, or by any municipal corporation, pursuant to authority of the defendant, State of California, or otherwise. That about the year 1890 the Harbor Line Board of the United States Engineers established the present United States Bulkhead Line; that said Bulkhead Line lies Bayward of said Water Line Front and easterly line of Water Front Street. That none of the said tide and submerged lands situated between said Water Line Front and easterly line of Water Front Street and the said United States Bulkhead Line has ever been conveyed by the State of California.

That the description in plaintiff’s complaint herein embraces the following lands:

(1) The lands lying Bayward of Water Line Front and the easterly line of Water Front Street and situated between such line and the United States Bulkhead Line;

(2) The lands lying outside the line of the “Stanford” patent and delineated upon the “Map of Salt Marsh and Tide Lands and Lands Lying Under Water” as Streets and Avenues.

(3) That portion of the Northwest corner of Tide Block 72, as delineated on the “Map of Salt Marsh and Tide Lands and Lands Lying under Water” which lies Bayward of the “Stanford” Patent Line.

That the lands above referred to are hereinafter referred to as Parcels Nos. 1, 2 and 3. [133]

That the said Parcel No. 1 comprises the area lying Bayward of the line of the Water Line Front and easterly line of Water Front Street and situate between such Water Line Front and the United States Bulkhead Line, and is more particularly described as follows:

“Commencing at the intersection of the northeasterly extension of the southeasterly line of Donahue Street and the United States Bulkhead Line; thence along said United States Bulkhead Line southeasterly to the northeasterly extension of the southeasterly line of Coleman Street; thence southwesterly along said northeasterly extension of the southeasterly line of Coleman Street to the northeasterly line of Water Front Street; thence northwesterly along said line of Water Front Street to said northeasterly extension of the southeasterly line of Donahue Street; thence northeasterly along said northeasterly extension to the point of Commencement. Containing 0.79 of an acre more or less.”

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel No. 1 is \$705.36.

That Parcel No. 2 contains that area shown on the “Map of Salt Marsh and Tide Lands Lying Under Water,” outside the line of the “Stanford” patent to the South San Francisco Homestead and Railroad Association, and delineated upon said Map as Streets and Avenues, and is more particularly described as follows:

“All those certain streets and avenues lying

within an area bounded on the west by the southeasterly line of Donahue Street, on the north and east by the Water Line Front and the southeasterly line of Coleman Street and on the south by the "Stanford" patent line. Containing 8.73 acres more or less."

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel No. 2 is \$8250.03.

That Parcel No. 3 contains the northwest corner, outside the "Stanford" Patent Line, of that area delineated upon the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" [134] as Tide Block 72, and is more particularly described as follows:

"Commencing at the intersection of the southeasterly line of Donahue Street with the southwesterly line of Davidson Avenue; thence southeasterly along said southwesterly line of Davidson Avenue to the "Stanford" patent line; thence northwesterly along last said line to said southeasterly line of Donahue Street; thence northeasterly along said line of Donahue Street to the point of Commencement. Containing 0.07 of an acre more or less."

That the reasonable market value of the lands, exclusive of minerals and mineral rights, contained in Parcel No. 3 is \$62.50.

That a copy of the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water" is attached to the Answer of defendant, State of California, as Exhibit "B" and is by this reference incorpo-

rated herein. That the said Exhibit "B" shows the line of the "Stanford" patent, hereinbefore referred to, and shows, delineated in blue (Parcel 1), red (Parcel 2) and yellow (Parcel 3) the areas owned by the defendant, State of California.

Wherefore, said defendant, State of California, prays:

(1) That the Court assess the sum of \$9,017.89 and award the same to the defendant, State of California, as compensation for the taking of its interest, exclusive of minerals and mineral rights in the said premises, in the land subject to this suit;

(2) That the Court adjudge the defendant, State of California, the owner of the sub-surface estate in the minerals and mineral rights;

(3) That the Order granting immediate possession and use of the lands herein, heretofore made on the 24th day of December, 1942, to such extent be modified; [135]

(4) That the Court grant such other and further relief as may be meet and proper in the premises.

ROBERT W. KENNY,
Attorney General of the State
of California.

/s/ HAROLD B. HAAS,
Deputy Attorney General.

/s/ MIRIAM E. WOLFF,
Deputy Attorney General.
Attorneys for Defendant
State of California.

[Affidavit of service by mail.]

[Endorsed]: Filed June 21, 1946.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action was consolidated for trial with United States v. 193 acres of land in the City and County of San Francisco, State of California, Civil 22261-R and United States v. Certain land in the City and County of San Francisco, State of California, Civil No. 22147, and came on for hearing the 25th day of June, 1946, before the above entitled Court, the Honorable Michael J. Roche present a jury having been waived by all parties, the cause having been duly and regularly continued to June 26, 1946, for further hearing and M. Mitchell Bourquin, Special Assistant to the Attorney General, John J. Healy, Jr., and J. Harold Weise, Special Attorneys appearing for the plaintiff, United States of America, and Robert W. Kenny, Attorney General of the State of California, Harold B. Haas, and Miriam E. Wolff, Deputies Attorney General, appearing for the State of California, and the evidence having been duly taken and heard and the cause submitted for decision, the Court makes and files its Findings of Fact and Conclusions of Law as follows: [137]

That the Complaint in the above entitled action was filed on the 24th day of December, 1942; that on the 23rd day of April, 1943, plaintiff filed a Declaration of Taking and deposited in the Registry of the Court, the sum of Two Hundred Ninety-Seven Thousand Twenty-Eight and 50/100 Dollars

(\$297,028.50) estimated just compensation for the taking of the property the subject of this action of which said sum One and no/100 Dollar (\$1.00) was deposited for the taking of Parcel 2 as hereinafter more particularly described. That on said day, April 23, 1943, a Judgment on said Declaration of Taking was entered decreeing that the title to all the land subject of the above entitled proceeding, including the land herein referred to as Parcel 2, and hereinafter more particularly described, vested in the United States of America in fee simple and the right to just compensation therefor vested in the persons entitled thereto upon the filing of said Declaration of Taking.

II.

That the above entitled action was instituted and the lands the subject matter of said action are taken and condemned pursuant to and under the provisions and authority of, and for the purposes and uses authorized by the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and the Act of Congress approved February 7, 1942 (Public Law 441, 77th Congress).

III.

That said lands were taken and condemned under the authority of the above mentioned acts of Congress for the expansion of facilities at the Naval Drydock, Hunters Point, San Francisco, California, and are suitable and necessary for said purpose;

that said use of said lands constitutes a public use, and that the acquisition of said lands by plaintiff was of the greatest public benefit and the least private injury.

IV.

That service has been properly made upon all persons interested in said lands hereinafter described: [138]

V.

That prior to September 9, 1850, the lands subject of this trial were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date, California was admitted into and became a member of the union of states upon an equal footing with the original states in all respects, and thereupon and by that fact acquired tide and submerged lands involved in this trial; that the Act of 1868 (Stats. of Cal. 1867-68, Page 716) created a Board of Tide Land Commissioners, and authorized and directed the said Board to take possession of all the salt marsh and tide lands and lands lying under water, situated in the City and County of San Francisco, and to cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide; that after completion of such preliminary survey, the Board was directed to establish the Water Line Front of San Francisco, and cause all the property belonging to the State lying south of Second Street, within the said County to be surveyed into lots and blocks.

That the said Act further authorized and directed the said Board to prepare maps of the area as resurveyed and to cause the lots as so established to be sold at public auction; that pursuant to said Act, the Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869.

That none of the lands claimed by the State of California in this action had been reclaimed at the time said action was commenced and that all of the land so claimed was tide or submerged lands.

VI.

That pursuant to said statute, said Tide Land Commissioners sold, at public auction, all the right, title, and interest of defendant, State of California, in and to the property in said lots exhibited on said map and said sales were by lots in accordance with said survey and map. [139]

VII.

That said Parcel 2 embraces and is a portion of certain streets and alleys exhibited and delineated upon said map, "Map of Salt Marsh and Tide Lands and Lands Lying Under Water."

VIII.

That the interest or title that defendant, State of California, retained in said Parcel 2 was retained only for the purpose of providing ingress and egress

to said lots sold and that the interest or title of defendant, State of California, in and to said parcel at the date of the taking herein was subject to easements for access to and from said lots exhibited and delineated upon said survey and map.

IX.

That said Parcel 2 is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the west by the southeasterly line of Donahue Street, on the north and east by the Water Line Front and the southeasterly line of Coleman Street and on the south by the "Stanford" patent line. Containing 8.73 acres more or less.

That just compensation for said parcel including any and all damages to the larger tract of which said Parcel 2 is a part is the sum of One and No/100 Dollar (\$1.00).

X.

Except as hereinbefore more particularly set forth all of the allegations, the Plaintiff's Complaint are true.

XI.

Except as hereinbefore more particularly set forth all the allegations of the answer and amended answer of defendant, State of California, are not true.

Conclusions of Law

I.

That the Court has jurisdiction of the parties and the subject matter of this action. [140]

II.

That the use for which the property is taken is a public use of the United States and that the United States is authorized by law to acquire the same by condemnation.

III.

That the damage suffered by the State of California for the taking of parcel 2 is the sum of One and No/100 Dollar. (\$1.00.)

IV.

That a Judgment of Condemnation in the form provided by law shall be made and entered herein.

V.

Let Judgment be entered accordingly.

Done in open court, this 22nd day of January, 1947.

MICHAEL J. ROCHE,
Judge.

Receipt of the foregoing Findings of Fact and

Conclusions of Law is hereby acknowledged this
12th day of December, 1946.

ROBERT W. KENNY,
Attorney General of the State
of California,

By HAROLD B. HAAS,
Deputy Attorney General
for Defendant State of
California.

[Endorsed]: Filed: Jan. 22, 1947.

In the District Court of the United States in and
for the Northern District of California,
Southern Division

No. 22416-R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Certain land in the City and County of San
Francisco, State of California, WILLIAM
HENRY ASH, et al.,
Defendants.

PRELIMINARY JUDGMENT AS TO
PARCEL 2.

The above entitled action was consolidated for
trial with United States v. 193 acres of land in the
City and County of San Francisco, State of Cali-

fornia, Civil 22261-R and United States v. Certain land in the City and County of San Francisco, State of California, Civil No. 22147-R, and came on for hearing the 25th day of June, 1946, before the above entitled Court, the Honorable Michael J. Roche presiding, a jury having been waived by all parties, the cause having been duly and regularly continued to June 26, 1946, for further hearing and M. Mitchell Bourquin, Special Assistant to the Attorney General, John J. Healy, Jr., and J. Harold Weise, Special Attorneys appearing for the plaintiff, United States of America, and Robert W. Kenny, Attorney General of the State of California, Harold B. Haas and Miriam E. Wolff, Deputies Attorney General, appearing for the State of California, and evidence, both oral and documentary, having been introduced by the parties hereto and the case having [142] been fully tried and presented to the Court, and briefs having been submitted by the respective parties and the cause having been submitted for decision on the 19th day of October, 1946, and the Court having heretofore filed its written Findings of Fact and Conclusions of Law;

Wherefore, by reason of the law and the findings herein.

It Is Hereby Ordered, Adjudged and Decreed:

I.

That title to Parcel 2, the subject of the above entitled action, will vest in the United States of America in fee simple absolute upon the deposit in the Registry of this Court of the compensation therefore herein awarded.

II.

That said Parcel 2 is that certain piece or parcel of land situate in the City and County of San Francisco, State of California, and more particularly described as follows:

All those certain streets and avenues lying within an area bounded on the west by the southeasterly line of Donahue Street, on the north and east by the Water Line Front and the southeasterly line of Coleman Street and on the south by the "Stanford" patent line. Containing 8.73 acres more or less.

III.

That the defendant State of California is awarded the sum of one dollar for said Parcel 2 together with interest from the date of entry of this Judgment until paid.

Done in open court, this 22nd day of January, 1947.

MICHAEL J. ROCHE,
Judge.

Approved as to form:

FRED N. HOWSER,
Attorney General of the
State of California.

By MIRIAM E. WOLFF,
Deputy Attorney General.
Attorney for the State
of California.

[Endorsed]: Filed and entered Jan. 22, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Michael J. Roche, judge of the District Court of the United States, Southern Division, Northern District of California, and to M. Mitchell Bourquin, Esq., Special Assistant to the Attorney General, and John J. Healy, Jr., and J. Harold Weise, Esqs., attorneys for plaintiff:

You and each of you will please take notice that the defendant, State of California, hereby appeals to the United States Circuit Court of Appeals, Ninth Judicial District, from that portion of the preliminary judgment as to parcel 2 therein awarding defendant, State of California, the sum of One Dollar for its interest therein and denying defendant, State of California, any further or additional compensation for the taking of said property.

Dated: April 21, 1947.

FRED N. HOWSER,
Attorney General.

HAROLD B. HAAS,
Deputy Attorney General.

MIRIAM E. WOLFF,
Deputy Attorney General.

[Affidavit of service by mail.]

[Endorsed]: Filed April 21, 1947. [144]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That Pacific Indemnity Company a corporation duly organized and existing under and by virtue of the laws of the State of California, and duly licensed to transact a surety business in the State of California, is held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to be paid unto said United States of America, for which payment well and truly to be made Pacific Indemnity Company binds itself, its successors and assigns firmly by these presents.

Signed, Sealed and Dated this 10th day of March, 1947.

The condition of the above obligation is such that [145] whereas State of California, defendant in the above entitled cause, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled court entered in said cause on the 22nd day of January, 1947:

Now, Therefore the condition of the above obligation is such that is the said appellant, State of California, shall pay all costs if the said appeal is dismissed or the said judgment affirmed, or such costs as the appellate court may award if the said judg-

ment is modified, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

It is further stipulated as a part of the foregoing bond that in case of a breach of any condition thereof, the above named District Court may, upon notice to said surety of not less than ten days; proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and award execution therefor.

[Seal]

PACIFIC INDEMNITY
COMPANY,

By R. L. TRAVISS,
Attorney in Fact.

State of California,

City and County of San Francisco—ss:

On this 10th day of March in the year one thousand nine hundred and forty-seven before me, Emily K. McCorry a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. L. Traviss known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. L. Traviss acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY,
Notary Public in and for the City of San Francisco,
State of California.

My commission expires December 21, 1950.

[Endorsed]: Filed April 21, 1947. [146]

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

No. 22416-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN LAND IN THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALI-
FORNIA, et al.,

Defendants.

ORDER FOR TRANSMISSION OF EXHIBITS
TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

It appearing to the court that the exhibits in the
above entitled matter consist of maps, diagrams and
original papers, not capable of reproduction in the
printed record,

Now, Therefore, It Is Hereby Ordered that copies of the original papers and exhibits which were introduced in evidence during the trial of said cause need not be copied in the Record on Appeal in said cause to be filed in connection with the appeal of said defendant and appellant, and that all original papers and exhibits introduced in evidence at the trial of said cause in the above entitled court by plaintiff, United States of America, and defendant, State [149] of California, with respect to Parcel 2, together with all the original papers and exhibits introduced in evidence at the trial of said action with respect to Parcels 3-A and 3-B of action 22147-R and Parcel 2 of section 22261-R, which actions were consolidated with the above entitled action for the purposes of trial, may be transferred and transmitted in their original form to the Court to which said appeal is taken, namely, the United States Circuit Court of Appeals for the Ninth Circuit; and

It Is Further Ordered that all such original papers and exhibits shall be included in and be a part of the Record on Appeal to the same effect as though copied therein.

It Is Further Ordered that the said exhibits and testimony introduced in evidence at the trial of Parcel 2 of the above entitled action were also introduced in evidence with reference to Parcels 3-A and 3-B of action 22147-R and Parcel 2 of action 22261-R, which actions were consolidated with the above entitled action for the purposes of trial, and that the original papers and exhibits, all of which

are the subject of this Order, may be considered by the court with like effect with reference to Parcels 3-A and 3-B of action 22147-R and Parcel 2 of action 22261-R.

Dated: July 29, 1947.

GEORGE B. HARRIS

Judge of the U. S. District
Court

[Endorsed]: Filed July 29, 1947. [150]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Comes Now Appellant, State of California one of the defendants above named, and states that its appeal is from that portion of the judgment decreeing that the State of California is entitled to receive the sum of \$1.00 and no more for the taking of parcel 2, which was given, made and entered in the above entitled cause on the 22nd day of January, 1947, and that said appellant will rely on its appeal herein on the following points.

I.

That the above-named United States District Court erred in finding that the interest or title that defendant, State of California, retained in said parcel 2 was retained [151] only for the purpose of providing ingress and egress to said lots sold.

II.

That the said Court erred in finding that the interest or title that defendant, State of California, retained in said parcel 2 at the date of the taking herein was subject to easements for access to and from said lots delineated upon said survey map.

III.

That the said Court erred in finding that just compensation for the taking of said parcel 2 is the sum of One and no/100 (\$1.00) Dollars.

IV.

That the said Court erred in not finding that said property was never laid out upon the grounds as streets.

V.

That the said Court erred in not finding and in not concluding that the said property was never opened nor declared open as streets.

VI.

That the said Court erred in not finding and in not concluding that the said property was never dedicated as streets.

VII.

That the said Court erred in not finding and in not concluding that the said property was not subjected to any easement as streets.

VIII.

That the said Court erred in rendering its decision and making and entering its judgment herein in that the evidence was and is insufficient to justify the judgment rendered by said Court. [152]

IX.

That the said Court erred in rendering its decision and making and entering its judgment herein against the defendant, State of California, in that said judgment is contrary to the law and the facts.

X.

That the said Court erred in not making its judgment herein in favor of defendant, State of California, and against plaintiff United States of America in the sum of \$8,250.03.

Dated: June 15, 1947.

FRED N. HOWSER,

Attorney General of the State
of California,

/s/ HAROLD B. HAAS,

Deputy Attorney General.

/s/ MIRIAM E. WOLFF,

Deputy Attorney General,
Attorneys for Defendant,
State of California.

[Endorsed]: Filed Sept. 4, 1947.

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 153 pages, numbered from 1 to 153, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cases of United States of America, vs. 230.5 Acres of Land, etc., No. 22147 R, United States of America, vs. 193 Acres of Land, etc., No. 22261 R, and United States of America, vs. Certain Land, etc., No. 22416 R (Consolidated for Appeal), as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$41.00 and that the said amount has been paid to me by the Attorney for the appellant, herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 22nd day of November, A. D. 1947.

[Seal] C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk.

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 22147-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

230.5 Acres of land in the City and County of San
Francisco, State of California, CARRIE F.
REDNALL, et al.,

Defendants.

No. 22261-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

193 Acres of land, City and County of San Fran-
cisco, State of California, MATILDA PRIOR
ANDREWS II, et al.,

Defendants.

No. 22416-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN LAND IN THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALI-
FORNIA, et al.,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, June 25, 1946

Before: Hon. Michael J. Roche, Judge.

Counsel Appearing:

For Plaintiff: M. Mitchell Bourquin, Esq., John J. Healy, Esq., Thomas Martin, Esq., J. H. Weise, Esq. [1*]

For Defendants: Robert W. Kenny, Esq., Attorney General of the State of California, Harold B. Haas, Esq., Deputy Attorney General, Miriam E. Wolff, Deputy Attorney General.

The Clerk: United States of America vs. Land in the City and County of San Francisco.

Mr. Healy: Ready, your Honor.

Mr. Haas: Ready, your Honor.

Mr. Healy: May it please your Honor, your Honor will recall this trial was to have commenced about three weeks ago, and just after getting started, because of another case, this matter was continued until today. Your Honor requested that counsel make every effort possible to stipulate to as many facts as we could, so that we could simplify the issues.

We have agreed upon certain facts, and they were drawn up. The State drew up the stipulation; and certain portions we were not able to agree with until a short time ago, and with certain amendments made by our office, these facts will read as follows. A little later we will have this document transcribed and presented to your Honor.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The facts we now stipulate to are as follows:

That prior to September 9, 1850, a portion of the land subject to this action, and all of the lands claimed by the State of California, were tide and submerged lands covered by the waters of the Bay of San Francisco; that on said date, [2] California was admitted into and became a member of the union of states, upon an equal footing with the original states in all respects, and thereupon and by that fact acquired title to all tide and submerged lands involved in these cases; that said Act of 1868, page 716, created a Board of Tide Land Commissioners, and authorized and directed the said Board to take possession of all the salt marsh and tide lands and land lying under water, situated in the City and County of San Francisco, and to cause the same to be surveyed to a point within 24 feet of water at the lowest stage of the tide; that after the completion of such preliminary survey, the Board was directed to establish the Water Line Front of San Francisco, and cause all of the property belonging to the State lying south of Second Street, within the said County to be surveyed into lots and blocks.

That the said Act further authorized and directed the said Board to prepare maps of the area as resurveyed and to cause the lots as so established to be sold at public auction; that pursuant to said Act, the Board caused said surveys to be made and prepared the "Map of Salt Marsh and Tide Lands and Lands Lying Under Water," which map was duly adopted by the said Board of Tide Land Commissioners on March 19, 1869.

That none of the land claimed by the State of California in these answers had been reclaimed at the time said actions were commenced and that all of the land so claimed was tide [3] or submerged lands.

It is further stipulated that the acreage claimed by the State of California in Action No. 22416-R, Parcel No. 1 as described in the amended answer filed by the State is 0.79 acres and that as to this said portion of the property, the plaintiff is compromising with defendant State of California and the parties pray that the court continue the hearing as to this parcel until a stipulation for judgment is filed.

That in Action No. 22416-R, in Parcel No. 2 as described in the amended answer filed by the State, the State of California claims 8.73 acres, and the parties do stipulate that 8.73 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

That in Action No. 22416-R, Parcel No. 3 as described in the amended answer filed by the State, the State has been paid its damages and the matter is not at issue as to that parcel.

That in Action No. 22147-R, Parcel No. 1 as described in the amended answer filed by the State, the State of California claims 7.909 acres, and that as to this said portion of the property, the plaintiff is compromising with defendant State of California and the parties pray that the court continue the hearing as to this parcel until a stipulation for judgment is filed.

That in Action No. 22147-R, Parcel No. 2 as described [4] in the amended answer filed by the State, the State of California claims 13.376 acres and the parties do stipulate that 13.376 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

That in Section No. 22147-R, Parcel No. 3A as described in the amended answer filed by the State, the State of California claims 6.85 acres, and the parties do stipulate that 6.85 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

That in Action No. 22147-R, Parcel No. 3B as described in the amended answer filed by the State, the State of California claims 28.13 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California.

It is further stipulated that the acreage claimed by the State of California in Action No. 22261-R, Parcel No. 1 as described in the amended answer filed by the State is 1.884 acres, and that as to this said portion of the property, the plaintiff is compromising with defendant State of California and the parties pray that the court continue the hearing as to this parcel until a stipulation for judgment is filed.

That in Action No. 22261-R, Parcel No. 2 as described in the amended answer filed by the State, the State of California claims 64.61 acres, and the parties so stipulate that 64.61 acres is the correct amount of acreage in said parcel claimed by the defendant, State of California. [5]

That in action No. 22261-R, Parcels Nos. 3A and 3B, the United States of America is compromising the claims of both the State of California and the City and County of San Francisco, and the parties pray that as to said parcels the court continue this hearing until a stipulation for judgment is filed.

That the matters relevant to the causes and not herein stipulated may be heard and determined at the trial on said parcels.

I may say to your Honor now the portions that the gentleman has been pointing to while I have been giving to your Honor the facts stipulated to, all of the portions that appear in blue or, I should say, all of the portions other than in pink, are matters that we have agreed upon, and there is no issue, and your Honor will not be troubled to decide those. Your Honor will be only concerned with the portions on pink on this large map.

Those, your Honor, after considerable conferences and meetings, we believe are the facts we are able to stipulate on, and the other points of the case, I think, are at issue. Is that correct, Mr. Haas?

Mr. Haas: That is correct, your Honor. This map has been set up so that it can be clearly seen that the only things we are here litigating about are the areas colored in pink. All of the rest have been compromised out and are not at issue. [6]

The Court: Very well.

Mr. Haas: Much of the material of the opening statement I had planned to make has been stipulated to. However, we shall bring in another map. The long and short of it is that the Board of Tide Land

Commissioners, acting under the Act of 1868, prepared this map and sold certain acreages.

The map, from here, can be very misleading, unless closely watched. Actually, certain areas are completely covered by water. Down the center is the main spine of Hunters Point, which was granted prior to this period of the tide land, and was privately owned by the so-called Stanford Patent. This is a photostatic enlargement of the other map. This is tide and submerged, and this is tide and submerged. As stipulated, what happened was, they took the existing upland pattern of blocks and so forth, and projected them out in the water, and it is on the map that you see marked as "Streets" and "Market places", and so forth. This is just simply open water, and unless that is remembered, the map can be extremely misleading. The statute directed they carry out the block plan, and that is why it was done that way.

We shall prove that all the area sold to private purchasers was confined to metes and bounds descriptions, but these metes and bounds descriptions were carefully drawn in each case to the inner line of the street, which under the settled California law means that the property owners' title [7] goes only to the inner line of the street and not to the center, as otherwise would be the case under the presumption of the Code of Civil Procedure. We shall supply cases, if you desire, on that.

By virtue of certain enactments of the Legislature, the City and County of San Francisco made claim to portions of the area, and that, of course,

has been compromised, and the City and County, therefore, is not a party to this hearing, although it is my understanding that in countering the State's claim of title, certain statutes involving the City and County of San Francisco will be urged, and there is a somewhat peculiar difficulty there.

In these condemnation suits, you cannot get quite the precisions of pleadings to define the issues as you do in the ordinary civil action.

We have most all of our proof in. We will put in more, but in connection with the statutes, which I understand the United States will urge, and we shall in a sense have to anticipate rebuttal.

We must have expert testimony to show the arrangements to which those statutes apply, and why our interpretation of that differs from the United States, and we believe our interpretation is correct, and that the factual proof involved will show the contention of the United States is not correct.

I think that in connection with this whole situation, it should be realized that the original plan for Hunters Point [8] development, back in 1868 and 1869, was very similar to that of lower San Francisco, and identical with that portion around Channel Street. The State had a sort of technique it worked out in developing the area around San Francisco Bay on this side. They granted these water lots or areas of water. *They* really sounds funny, but as it worked out they granted them on the basis of a map like this, and there is a similar one of the water lots; and in that area they retained the bulkhead strips, and when reclamation took

place the State ended up with possession of wharf sites out there, and it is a matter of history of which your Honor can take judicial notice: For instance, that the entire expense of the building of the waterfront here, and of the maintenance order of, I would say now, about 50 decades, or more, has been paid out of the revenues of those wharves, and it is operated at the present time by a State Board. That is the historical reason why the State of California has this waterfront in San Francisco, whereas many others have been granted to various cities and counties. But it worked out of that plan, which, of course, was speculative, and at that time no one knew what direction San Francisco would develop, and this was just one more sale of tide land lots, that everybody was going to make a profit out of, and the State was going to end up with waterfront property of great value.

This followed down to Second Street. This was a 99-year [9] lease, instead of being handled like the other land, but it is substantially the same (indicating on map).

There is some confusion that should be cleared up right now——

The Court: The confusion will be laid at rest if the State would give us that property, the harbor, and everything in relation to it. I thought they were going to do that, and I am hopeful that the City will acquire all of it.

Mr. Haas: It may not be too late, your Honor. But there is a clearcut picture of this as set forth in the memorandum of the Honorable James Alger Fee, who tried a portion of the case.

I will give you the history of it. One of the blocks, I think 708, or parcel 594, was to be limited. The State, in an effort to get a simple case, to have its claims determined in connection with these strip areas, intervened and filed an answer, claiming title to the centers here, and the private owner also claimed title out to the center. I don't know whether the judge had a clear picture as to the source of title in the matter, because he seemed to have the picture in mind that all the State had was an easement. Actually, the State had the fee, but that was not at all clearly brought out. The State lost in its claim and appealed the case to the Circuit Court of Appeals.

The Circuit Court of Appeals said two things: First, the [10] Circuit Court of Appeals said on that basis that there would have to be 272 separate trials, one trial for each parcel, that the State should call for a single valuation here in the case. We carried that one step further. We asked to consolidate all cases, so we are having a single valuation here on all three cases. The second point was that the State, never being in that trial properly, being improperly in the trial, the matter should be tried as a whole.

So that is the picture.

Now, another thing that is admitted is that the property was always under water. That applies to this area. It is all tide land area, and was long before the time these suits were filed; in fact, so many years before that we cannot get the exact date that the bulkhead and pierhead lines were estab-

lished along this waterfront, leaving the State title to the ground upon which these future wharf sites appear to be built. That particular claim is being compromised, so I won't dwell on it. That is one of the blue parcels being compromised, and the title to that is being admitted.

Briefly, the case of the State is that these strips never actually became streets, that they were laid out on a map, but by reason of never actually becoming streets, they simply constitute strips of land which the State is now claiming as acreage in the proceeding.

The Government, I believe, contends that these are, in effect, streets. In that connection, and as background on [11] the case, I think I should refer your Honor to the case which is ultimately the foundation of our claim here as to the streets. That is the case of *United States vs. Benedict*, Circuit Court of Appeals, Second Circuit, 1922, involving the condemnation of an area in New York with the Bethlehem Shipyard. The area was in the City of New York.

Very briefly, and I must ask your Honor's indulgence for giving these facts to you, because you will see how the evidence connects up with this case, in that case this area on the shore of the bay was condemned. It belonged to a private estate. Therefore, the proceedings were against the executor and so forth. Now, before his death, the decedent had planned to set up a subdivision development there of some sort, and had granted strips of land reaching in from the bay for street purposes to the City

of New York, and granted them in trust for street purposes, for strips of land. The street strips so granted were never opened. It was all one solid block. In the condemnation in the district court, the entire award was made to the State on the basis that these strips were streets, and under the established rule in condemnation, the value thereof should be absorbed in the surrounding property. The Circuit Court of Appeals, on appeal, in its decision, pointed out that the streets had never been opened, that this doctrine of absorption of value into the surrounding property depended upon the opening of the streets, because it was that [12] opening of the streets that gave the value to the surrounding property. Therefore, the City of New York, at the time of the condemnation owned that property, and the court held that the United States must take the land as it stood at the time of the condemnation, and the question of future use was reaching ahead into speculation, and therefore the City of New York was entitled to a value which the court said was a proportion of the acreage which these strip areas and street areas bore to the total acreage, and gave the executors the choice of either accepting a diversion of the portion of the award to the City of New York in that proportion; or of the reversal.

The executor accepted. I think about three months passed, and then the City of New York woke up to the fact that they only had claimed tide land down to the high water mark. So they applied for certiorari to the United States Supreme Court on the basis that they should have been paid for the

portion below; in other words, they had not set up the portions properly on the appeal. The Supreme Court said that having taken the money, the effect of that foreclosed them, and denied certiorari.

In the Benedict case, it was never questioned that the dedication for street purposes was complete. The conveyance was in trust for streets, and the authorities in such a case would hold that the city could not, under any condition, change that acceptance in trust, except, possibly, by conveyance [13] back to the land owner. So that we have a different situation.

I think, your Honor, we are going to ask to put this on briefs, with your Honor's permission, when it comes to the law. We don't believe it is a dedication and acceptance. The United States contends it is. That merely strengthens our case, from our point of view, because, basically, the court's concern is not what the future use of the street area is to be. It is what was done at the time of the condemnation.

The Court: We will take a recess for a few minutes.

(Recess.)

Mr. Healy: Are you finished, Mr. Hass?

Mr. Haas: Yes, I am finished with my opening statement.

Mr. Healy: May it please your Honor, I should like to add a few remarks to those made by Mr. Haas, with the thought perhaps that we could make it a little easier for your Honor as the evidence

goes in. This map which is on the board now, as your Honor may quite well see, is a segment of the map which the State, I think, will produce here later, a segment of this map which is so well known to all of us, and is known as the "Map of the Salt Marsh and Tide Lands Lying Under Water in the City and County of San Francisco." That map, at the most northerly extremity, is from Second Street, and extending in the area to the south and to the southeast of it. Your Honor will probably note there is a dark line that [14] runs along here that extends out to what was then Hunters Point up until the time the Government came along and filled in a lot of this area during this last war.

All of this land in this direction, which would be to the south, was under water, and all of the land to the north of the dark line was under water. The only land that was high land was within the embrace of this dark line (indicating on map).

Now, as your Honor knows, there are three actions that are being consolidated here for trial. The State has filed an answer in each of these actions, in which it has attached this entire map to each of the answers as an exhibit, and has claimed that it owns certain portions of the area which are set out on the map as streets. I should like to point out to your Honor that this map was made by the Board of Tide Land Commissioners pursuant to the statute of 1868 which was referred to in the stipulation, at page 716 of those statutes.

I should like to point out to your Honor, and this is a matter that your Honor can take note of

because it is the statute of this State, that by that act a commission of three men was set up with authority, in brief, now, "to survey all these lands south of Second Street, and to dispose at public auction of all right, title and interest of the State of California in and to the property in the lots described in section 4 of this Act, such sales to be by lots in accordance [15] with the survey and map provided for."

I have quoted just now from the statute, itself. It is our theory in this case, may it please your Honor, that this statute of the State of California, which authorized the drawing of this map, the surveying of the land, the holding of the auctions, the sale of the land, and the giving of deeds was all to to be done by lots, which was done—lots and blocks; that, as a result thereof, the State of California did divest itself of all title in and to these areas here that are demarcated as streets; that if they retained anything in that area, and I say if they retained anything in that area at all, they retained a naked, bare fee to be held in trust for the public for street purposes, and that if the court should hold that they even retained that naked, bare fee, if I may use the words, that any value that would be ascribed to that is reflected in the value of the lots adjacent to the streets, and which has been already paid to these various landowners that we have already settled with.

In this particular case, 22147-R, which is embracing this area here, and also the area over in here, one of the defendants, by the name of Hutchinson, owned, as Mr. Haas stated, this block 708.

I should like to, I think, correct Mr. Haas in one statement, that he, inadvertently, I believe, made, that the State of California filed an answer in that particular action. I think they did not, Mr. Haas, file a separate [16] answer for the trial of that parcel, but it was just the same answer that is before his Honor today, in which they claim all of these streets.

A trial was had early in 1944. His Honor, Judge Fee, presided, and Judge Fee wrote a short memorandum opinion, declaring that the State of California, if they had any interest at all, was, and I quote his language, "A mere hypothetical interest to which it was not entitled, for which no compensation should be paid."

The State of California took an appeal to the Circuit Court of Appeals, and the Circuit Court of Appeals wrote an opinion which appears in—and your Honor has probably seen it—153 Fed. (2d) at page 558. The State of California held that error had been committed in trying this area of streets around that one parcel, because as the Circuit Court said, you would have to have 250 or 300 trials, that all of the street areas should be tried together, but the Circuit Court of Appeals did not reverse or criticize or disparage the holding of Judge Fee, who stated in his opinion that the State had a mere hypothetical interest. As a matter of fact, they specifically said they would not pass on the question.

The court said:

"We do not here decide what right, title or interest, if any, the State may have, or possess

in any of the street areas in the said 238-acre tract of land. That [17] sent it back to this court for trial as to what, if any, interest the state has in these street areas, first; and secondly, if they have any interest, what is it worth, if anything."

Now, I should like to add another point there, too, may it please your Honor. The City and County of San Francisco had an answer in all three cases, in which they made practically the same claim that the State has. The City said they owned the streets. The City's attorney appeared here on June 4th when this case was first called for trial, and upon settlement being reached for these market place areas, here, the City has walked out and makes no claim for these long strips, that is, these street areas.

I should like to point out to your Honor, further, that there is one case, and only one, that I know of that discusses all phases of his problem, and it is a case that, while it may not be entirely controlling, I think it is most instructive, and the principles therein enunciated are directly in point, because it deals with the same map, the same land—a little further north—and almost the same problems, and that is the well-known case of *Magin vs. The State Board of Harbor Commissioners*, reported in 113 Cal. App., at page 698, while I will not discuss the law with your Honor at this time, I think it appropriate that I say to your Honor that it will be one of our contentions that the principles of law laid down [18] and enunciated in the *Magin* case, will apply here.

Now, that the State prepared this map pursuant to this statute of 1869, by direction of the statute, these three gentlemen, these commissioners were authorized, first, and directed to sell all this territory by lots, that they did sell, and that in selling, as pointed out in the Magin case, they cannot at this late date contend they have any interest whatsoever in these lots; but it is our contention that as Judge Fee said, even if they have some hypothetical interest, that hypothetical interest in these streets 20 feet under water is only nominal.

I don't know whether I have assisted the court at all, but I have tried to, and those are the points, your Honor, that we rely upon in this case.

I would like to point out further to your Honor and say this, that there may be some evidence adduced here as to the kind and character of the deeds that were actually issued by the Board of Tide Land Commissioners to the original owners. I think a great many of them were burned in the San Francisco Fire and Earthquake of 1906.

It is one of our contentions that the form of the deeds, if some of them are produced, is immaterial, because the form of the deed cannot differ or vary from, nor be at variance from the mandate of the statute of 1868 that ordered these three tide land commissioners to sell this area by lots, and [19] whether the form would be different or not, there may be an argument. But under well-settled law that we will point out further to your Honor, the statute must be read into the deeds, and the deeds cannot be different from or construed to be different

from the fountainhead or authority, which is the statute authorizing the commissioners to sell by lots.

Again, may I say to your Honor, I want to avoid reading law to your Honor, but I feel I must read just one more quotation from the Magin case:

“That the sale by lot number and not by metes and bounds, but by reference to a map which the owner has recorded for that purpose, constitutes an acceptance irrevocable to the purchaser as to the portions designated on the map as public streets, has never been disputed.”

That brings us to the conclusion that the State of California has divested itself of all interest in and to these long strips of land, 18 or 20 feet under water, and it will be our contention they have done it on this portion of the map (indicating).

It is our contention they have divested themselves of all proprietary interest, and secondly, even if they have a hypothetical interest, as Judge Fee said, that is reflected in the value that is ascribed to the adjoining lots, and at the most the compensation to be paid should be nominal.

The Court: Keeping in mind what Mr. Healy has been discussing, [20] I did not follow your New York City case. What is your reaction to that case? Are you familiar with it?

Mr. Healy: Yes, your Honor, we are familiar with it. In the New York case, there are a number of differences. One as we understand the law in New York, it is not as settled as it is in California. In New York, the rule of property prevailing, ap-

parently does not give the adjacent property owner a permanent easement in the street, as it does in this State. In this State, as many authorities are cited in the Magin case, when a conveyance is made by, shall we say, a subdivider, whether it is the state or the private owner, and he conveys by a lot and block, the presumption is that he conveys clear out to the center of the street, and when he conveys out to the center of the street he has no further interest therein.

The rule of property in New York seems to be at variance to the rule of property in this State. What we are saying is not something thought up in the Lands Division of the Department of Justice. This has been threshed out in the Magin case, and this has been threshed out in the old case of *People vs. Johnson*, in 64 Cal., wherein the court definitely said that by another statute to which I haven't yet called your Honor's attention to, the statute of 1872, that by that statute the State of California conveyed all those streets, lock, stock and barrel, if I may use the phrase, to the City and County of San Francisco. That is not our statement. [21] That is the statement of the Supreme Court of the State of California in *People vs. Johnson*, in 64 Cal.

I again state to your Honor I do not desire to read law, but since your Honor asked me the question——

Mr. Haas: I beg your pardon; wasn't that the case of *People vs. Williams*?

Mr. Healy: Yes, that was the case of *People vs. Williams*, in 64 Cal. I now ask your Honor if

I may refer just briefly to the statute of 1872, not the statute of 1868, but the statute of 1872, in which the Supreme Court said that the State vacated all streets, alleys, market places within the exterior boundaries of the marsh and tidelands as surveyed by the Tide Land Commissioners, and granted the lands covered by them to the City and County of San Francisco, with full power to regulate, manage, control and dominate, or dispose of the same by ordinance for railroad and other commercial purposes.

I know that counsel will say that the Supreme Court was wrong in that they did not consider the statute correctly. I am not saying that the Supreme Court was right or wrong, but the Supreme Court, definitely, in 1884, when these things were probably fresher in the minds of the men writing the opinions, held that the statute of 1872 was valid and the State had divested itself of all interest to that property——

The Court: Assuming it is wrong, it was still the law of the State of California. [22]

Mr. Haas: If it is the law, your Honor.

Mr. Healy: Those are the remarks I wanted to express to your Honor, what our contentions are.

The Court: Does counsel for the State want to comment on the differentiation of the land laws of the State of New York and the State of California?

Mr. Haas: For two reasons I will not, unless the Government's contention as to the interpretation of the statute be completely accepted. In this case there is no difference, since the deed is conveyed to the

center of the street, anyway. The only purpose for which I brought up the case was to give a clear picture of what I wanted to bring, and I would suggest we brief these matters at a later time.

The Court: All right.

Mr. Haas: I am here going to offer, pursuant to the complaint and the instructions of the State of California, a certified copy of the Resolution of the State Lands Commission of the State of California requesting that no further alienations of any kind of State Lands or tide land or mineral rights be reserved to the State.

We have asked your Honor, as a matter of record in this case to make such a reservation on this property. I won't go into the law as to whether you could do that, or not, but for the record we offer this in evidence.

Mr. Healy: Let it be received. We understand, however, [23] that any defendant is not able to cut down the estate that the Government desires to take. In other words, the Government here seeks, through a deed by the operation of law, by the filing of a declaration of taking, to condemn the property and asks that the mineral rights be included.

We object to that document on the ground it is incompetent, irrelevant and immaterial.

The Court: I will allow it in evidence subject to your motion to strike.

(Resolution of State Lands Commission
marked Defendants' Exhibit A.)

HAROLD E. GEORGE,

called as a witness on behalf of defendants; sworn.

The Clerk: Will you state your name to the court? A. Harold E. George.

Direct Examination

By Mr. Haas:

Q. Your address, Mr. George?

A. 301 State Building, Los Angeles, is my business address.

Q. You are an associate civil engineer of the Division of State Lands? A. Yes, sir.

Q. Are you licensed as a civil engineer?

A. Yes, sir.

Q. For how long?

A. Roughly, since the law first went into effect in 1929 or 1930.

Q. How long did you actively practice the profession of civil [24] engineering prior to that time?

A. It is a little difficult to say, but off and on since 1918.

Mr. Haas: This is a certified copy from the custodian of the original map of the Salt Marsh and Tide Lands, and the Lands Lying Under Water. The map was prepared by the Board of Tide Land Commissioners in accordance with the Act, entitled "An Act to Survey and Dispose of Certain Salt Marsh and Tide Lands Belonging to the State of California, Approved March 30, 1868." And, your Honor, I may mention, it contains a notation. "Scale—500 feet to 1 inch."

(Testimony of Harold E. George.)

The Court: For the purpose of the record let it be admitted and marked.

(Map marked Defendants' Exhibit B.)

Q. (By Mr. Haas): Mr. George, you are a member of the American Society of Civil Engineers? A. Yes.

Q. You have made a study of this map which has just been admitted as Defendants' Exhibit B?

A. Many times.

Q. Now, you have seen the blown-up portion of the map that is on the other side?

The Court: Offer it, so the record will be clear.

Mr. Haas: I want to offer it, your Honor. Will you gentlemen stipulate to having seen the other portion?

Mr. Healy: Of course, we have been talking about it all the time.

Mr. Haas: I offer that as Exhibit 7. [25]

(Blown-up portion of map marked Defendants' Exhibit C.)

Q. (By Mr. Haas): I will ask you to state from your own knowledge the nature of that blown-up large map there—just what is it?

A. The blown-up portion of the map is a photostatic copy, in blown-up size, of a portion of the map which is facing you?

The Court: Outline it.

A. One on this, you mean?

The Court: Yes.

(Testimony of Harold E. George.)

A. It is roughly an area right in—something that, taking in that portion, and eliminating all of this larger area.

Q. (By Mr. Haas): And the scale of that map is true to the scale of the original from which it was blown up?

A. Very accurately so, considering the photo-static method of enlargement.

Q. That scale is what, approximately?

A. That scale on the larger map is 1 inch on the map for 100 feet on the ground.

Q. Turning to Defendants' Exhibit C, the blown-up map, I ask you, for the record, what is represented by these areas marked in pink, but which, I might point out, consist of certain portions of streets numbered successively, Eleventh Avenue to Nineteenth Avenue, and portion of a street marked "Waterfront Street," certain portions of the street marked, respectively, "Waterfront Street, Front Avenue," and First to Fourth Avenue, consecutively, certain portions of streets marked "C" [26] Street, China Street, "B" Street, "A" Street, Ship Street, Dock Street, Tevis Street, it being understood that I referred to the term "Street" for identification on the map. Will you tell the meaning of the pink markings?

A. Those are the areas that were intended as streets by the surveyor who made this map for the Tide Land Commissioners.

The coloring was done under your supervision, was it not? A. Yes, sir.

(Testimony of Harold E. George.)

Q. What, if anything, was your guide in marking those particular portions pink?

A. Various maps, including the one on the opposite side of the board, which is, Defendants' Exhibit B.

Q. I will put it another way: Why were those particular portions of the streets marked pink?

A. Because they were areas which were not sold by the State, the way we understand it.

Mr. Healy: We move to strike the answer as non-responsive and as calling for the opinion and conclusion of the witness.

The Court: It may go out.

Q. (By Mr. Haas): Did you or did you not have before you, in determining the extent of the portions of these arrangements which are marked pink, and where you would stop marking them pink and leave the original coloring there, did you have before you a description? A. Yes, we did.

Q. What were those descriptions?

A. Also, the description of the grant—you mean of this area in the center?

Q. Of the pink, the portions marked pink. [27]

A. At what part they stop?

Q. Yes, why did you stop the portion that is colored on Thirteenth Avenue at a certain point in the block marked on the map between "A" Street and Ship Street? Why did you stop here?

A. That was the point I wanted to clear up. That is a line called the Stanford Line, and is the boundary line of the grant to the San Francisco Homestead Railroad Association by the State Legislature.

(Testimony of Harold E. George.)

Q. But what document did you use from which you knew you should stop the marking from the Stanford Line?

A. From the Legislature. That was already granted to somebody else.

Q. I will ask you if these areas in pink have any relations to the descriptions in the complaint in condemnation?

Mr. Healy: I will stipulate with you that those areas marked in pink are the portions you are claiming in the three actions, and these portions over here you did not mark in pink are portions of the old Stanford Grant which you do not claim.

Mr. Haas: I now must ask the question because I am anticipating rebuttal: Is it claimed that the statute of 1878, other than the Street Act of 1872, constituted a conveyance of these streets to the City and County of San Francisco?

Mr. Healy: You mean the statute I referred to in *People vs. Williams*?

Mr. Haas: Yes.

Mr. Healy: That is what the Supreme Court of the State of California said. It is fairly good [28] authority for me.

Mr. Haas: We will have to put on authority for the extent of that statute. I will ask to introduce a couple of documents with the thought of expecting to connect them up.

Mr. Healy: For whatever these may be worth we have no objection to those being offered in evi-

(Testimony of Harold E. George.)

dence, if you will explain to the court what they are and all about them. At least, explain where they are.

Mr. Haas: One of the defenses urged by the United States is that these street areas were granted to the City and County of San Francisco by the Statute of 1872, Chap. 490, copy of which I have here and available for your Honor's inspection. However, there is certain language in that statute the interpretation of which is sufficiently ambiguous to require proof. It is my purpose now, in offering this, to put in these exhibits as bearing on the interpretation of that statute, intending that these factual exhibits will conclusively show that the Supreme Court in its dictum in *People vs. Williams* was wrong, and further, as between the City and County of San Francisco and the State of California, the question of title to the street areas in these tide land grants is *res adjudicata* in favor of the State.

I will bring in evidence and records of the Superior Court to demonstrate that.

Mr. Healy: With the Court's permission, will you repeat your statement about *res adjudicata*?

The Court: The reporter will read it.

(Record read.)

The Court: Frankly, I don't quite follow you, Counsel.

Mr. Haas: I believe the contention of the United States is that the title to these street areas, some of

(Testimony of Harold E. George.)

which are here colored in pink, become street areas generally, in that the tide land grant was alienated to the City and County of San Francisco by the State under the statute of March 30, 1872, which is Chapter 490 of the Statutes of that year, so that it is 1871-2. What we are doing here, and I make this explanation because, otherwise, it might be a little obscure, is bringing in evidence, first, that the Supreme Court, in *People vs. Williams*, misinterpreted the statute.

The Court: Assuming they did misinterpret, the fact is it is still the law.

Mr. Haas: It was dictum in that case.

The Court: How am I to determine that?

Mr. Haas: By reading the case, and I think you will find, in bringing out the law——

The Court: You want me to disregard that case of the Supreme Court?

Mr. Haas: I expect you to.

The Court: I am not going to do that, and I say that so that you will arouse yourself to greater effort than you have even put forth so far, and I say that kindly to you.

Mr. Haas: I understand that, your Honor. [30] I think we can convince your Honor that the title to the portion of the streets included under the *People vs. Williams* interpretation of that statute has been litigated in the Superior Court between the City and County of San Francisco, the donee under this purported statutory grant, and the State of California, with the judgment for the State of Cali-

(Testimony of Harold E. George.)

fornia, which would be *res adjudicata* directly as between the City and County of San Francisco and the State of California, in which judgment was for the State of California. We will bring that in, your Honor, later on, and I think that shows the truer interpretation.

We offer to present expert testimony upon these grants which were cavalieredly passed upon by the Supreme Court in its dictum in *People vs. Williams*.

First of all, I wish to read here the provisions of the statute referring to this. They are rather confusing. The statute has been amended several times, but in the first editorial section it reads as follows:

“All streets and alleys in the City and County of San Francisco which lie within the exterior boundaries of certain salt and tide lands donated by the State to the Southern Pacific Railroad Company and Western Pacific Railroad Company for terminal purposes, being an Act entitled, ‘An Act to Survey and Dispose of Certain Salt Marsh and Tide Lands Belonging to the State [31] of California, Approved March 30, 1868,’ and also all streets and alleys within the exterior boundaries of lands lying within the boundaries of said lands, not donated to said railroad companies, be reserved for market places, known as Produce Exchanges, and the market places are hereby vacated and the lands covered by said streets and alleys and said market places, together with other lands set

(Testimony of Harold E. George.)

apart by the Board of Tide Land Commissioners for basins and known as China and Central basins, are hereby granted to the City and County of San Francisco, with full power to regulate, manage, control and dominate, or dispose of the same for railroad and other commercial purposes.”

That is a very confusing statute, and if there is any foundation for the statement of the Supreme Court in *People vs. Williams*, that means that every street in this area is vacated and the City and County of San Francisco has full title, because the State at that time had power to vacate the streets, and therefore, very conclusively, they are not streets, and the City and County of San Francisco is not entitled to full acreage value of all of them, if you accept the erroneous interpretation of *People vs. Williams*, because in donating them to the city, they vacated.

I am going to turn this around again, your Honor.

(Moving blackboard.)

This is preliminary to questioning Mr. George. We have [32] here Exhibit B, which is that map.

Q. Mr. George, I show you an original record of the original land of the Tide Land Commissioners.

A. Is that the same as you are showing me?

Q. You have a photostatic copy before you, which is entitled, “Map 6 of Salt Marsh and Tide Lands Situated in the City and County of San Francisco, to be Sold at Public Auction by Order of the

(Testimony of Harold E. George.)

Board of Tide Land Commisioners." I ask you if you have studied this map in connection with the map, with the main map?

A. Yes, sir, I have.

Q. Will you indicate what portion of the main map, if any, is covered by that map? (Addressing the Court:) I might add, your Honor, that was one of the same maps that was used in the sale of the lots. Just indicate that roughly, Mr. George.

A. It covered an area approximately in the northern part of the large portion of the map in China and Central Basins.

Q. And area near China Basin?

A. It is roughly this area in here (indicating).

Q. The record cannot show your hand movements.

A. I am sorry.

Q. Indicate for the record the area.

A. It runs north from Islais Creek to China Basin and includes China Basin to Second Street.

Mr. Haas: I will offer the certified copy, again that being the original.

The Court: Let it be admitted and marked.

Mr. Healy: May I interrupt for a moment, your Honor, to register an objection that this evidence is incompetent, irrelevant, and immaterial for this reason, just getting down to the elements: The way the case is developing and the way, of course, we anticipated the case would develop, that the State is attempting to prove its title to the land in question; now, the State, apparently, is anticipating and is arguing and quarreling with the Supreme Court to

(Testimony of Harold E. George.)

demonstrate to your Honor that the Supreme Court was wrong about something over here. I say that with deference to counsel and your Honor, and as to the title over here, that is incompetent, irrelevant, and immaterial. The only thing now before this court is title within the perimeter of the lands in question, so I think we are quite a ways off in establishing it over here (indicating).

The Court: We will get counsel to commit himself for the purpose of the record. What is the purpose of this offer?

Mr. Haas: The purpose of the offer is to show the proper construction of the statute of 1872, Chapter 490, under which, according to the contention of the Government, the portion of the street areas within the present areas of condemnation is alienated by the State. The purpose of the offer is to show that an entirely different area was alienated by that statute; and to offer the necessary proof to identify that area to show that the Statute of 1872, Chap. 290, does not affect the situation in this case.

Mr. Healy: Again, I say I don't want to be discussing law, but counsel is anticipating, apparently, what I said would be one of our contentions a legal contention which right now we will say, with deference to counsel and your Honor, that the sole purpose would be to enlighten your Honor as to whether or not they have something which would have given them any interest in this land, not to disparage something the Supreme Court said about this land over here (indicating).

(Testimony of Harold E. George.)

The Court: I agree with you, counsel. But so he has a record when he gets over to the Circuit Court of Appeals, he will see it as closely as he thinks he sees it now. I have tried to indicate by suggestion I was not going to interfere with the Supreme Court. I am saying, if that is the law of the case, I must accept it as the law of the case, and the decision of the Supreme Court.

Mr. Haas: I don't believe that is the law of the case. The State was not a party to the proceedings from the point of view of litigating that particular piece of land.

The Court: However, you have slept with your case longer than I have and I will give you a record on it.

Mr. Healy: May we note an exception?

The Court: Note an exception for the benefit of the record. I am allowing it to go in subject to counsel's objection and subject to a motion to strike.

(The document was marked Defendants' Exhibit D.) [35]

Mr. Haas: I now offer, your Honor, certified copy of two documents, one consisting of an extract of the minutes of the Tide Land Commissioners, commencing with the date, Friday, June 11, 1869, and the other, consisting of certified copy of a patent to C. P. and S. P. R. R. Co., Tide Lands, San Francisco, which commences with the heading, "U. S. A." The copy of the minutes are offered as the next exhibit in order.

The Court: It may be admitted and marked.

(Testimony of Harold E. George.)

(The document was marked Defendants' Exhibit E.)

Mr. Haas: I offer the patent as the next exhibit in order.

The Court: It may be admitted and marked.

(The patent was marked Defendants' Exhibit F.)

The Court: At this time we will take a recess until two p.m.

(A recess was taken until two o'clock p.m.)

Afternoon Session, Tuesday, June 25, 1946

2:00 P.M.

The Clerk: United States vs. Certain Land of San Francisco.

Mr. Healy: I believe before the recess Counsel was offering in evidence the patent.

Mr. Haas: The patent and the extract from the minutes of the Tide Land Commission, showing the description of the railroad land.

Mr. Healy: May our objection be noted to the reception of those two documents on the same grounds that we objected to this map, Defendants' Exhibit D, on the ground that it is incompetent and immaterial and does not tend to show or throw any light upon whether or not the State has title to the land in question?

The Court: I tried to indicate that I agree with you, but I wanted to give Counsel a record.

Mr. Healy: I just wanted to state for the record that objection.

The Court: Let the record so show. I will allow the testimony to go in subject to a motion to strike and overrule the objection of Counsel.

Mr. Haas: If the Court please, I think my remarks before the recess may have given a false picture to the Court of our contentions in this matter with regard to the case of *People [37] vs. Williams*. I do not want to give the impression that we are trying to present proof that the Supreme Court was wrong in that case. Our contention is that that case properly falls in our favor. However, I think in reading that case it will be of great value to have in mind the evidence which I am now about to draw from this particular witness, and that is the basis. We are not contending that the Supreme Court is wrong, simply that the Government is misconstruing its statement in *People vs. Williams*.

HAROLD E. GEORGE

recalled for the State of California; previously sworn.

Direct Examination (Resumed)

By Mr. Haas:

Q. Mr. George, referring to the extract from the minutes of the Tide Land Commission, which has been admitted as Defendants' Exhibit No. E,

(Testimony of Harold E. George.)

the patent to the Tide Lands, which has been admitted as Defendants' Exhibit F, and the map, No. 6, of the Salt Marsh and Tide Lands, which has been admitted as Defendants' Exhibit D, I ask you if you made a study of these three exhibits?

A. I did.

Q. Did you or did you not find a relationship between the blocks, which on the certified copy are marked in yellow, the certified copy being Exhibit D, and the blocks described in the extract from the minutes as embodying the railroad grant and in the patent as embodying the railroad grant?

A. The blocks [38] marked in yellow on the map are shown the way they are described in the patent.

Mr. Haas: I want to call the Court's attention to the fact—and we will furnish, if you desire, a typewritten transcript of this and to the other counsel, because this is all longhand, being the records of 1869 and 1870—that there is in the railroad grant, to begin with, the grant was described by exterior boundaries, which exterior boundaries substantially comprehend these yellow blocks, and that grant or that proposed location was disapproved by the Commission and was followed by an approval of the location by block.

Also to clarify one matter this morning, in the act of 1869 and 1870, the direction to the Tide Land Commission to sell by lot is accompanied—and we will furnish you a copy of the wording of the statute for your convenience—is accompanied by a reservation of docks, basins, streets, market

(Testimony of Harold E. George.)

places, and so on. That is in connection with the theory that all the State's title had to be parted with.

The Court: Make it clear for the purposes of the record: What is the purpose of this offer?

Mr. Haas: The purpose of this offer is to give the factual background necessary to an interpretation of Chapter 490 of the Statutes of 1872, which, if not properly read, might give the impression that all the streets, all the street reservations in the entire Tide Land area, within the boundaries of San [39] Francisco County, had been vacated and turned over to the City and County of San Francisco.

The Court: Is it offered for that limited purpose?

Mr. Haas: For that limited purpose, your Honor.

The Court: Proceed.

Mr. Haas: Your witness.

Cross-Examination

By Mr. Healy:

Q. The area depicted on this map in evidence as Defendants' Exhibit D is located about how far removed from the closest portion of land that is claimed by the State in the three actions before the Court?

A. Do you mean in feet or miles?

Q. Any way you want to express it?

A. I will have to check that somewhat. It won't take but a moment.

(Testimony of Harold E. George.)

Q. Give us an estimate of that?

A. It won't take but a moment to do that. I would say roughly a mile and a quarter.

Q. About a mile and a quarter? A. Yes.

Q. So the land that Counsel has been discussing with you and interrogating you on, which is shown in this Defendants' Exhibit D, and which is referred to in this patent to the two railroad companies, Defendants' Exhibit D and Defendants' Exhibit E, is about a mile and a quarter from the subject property, will we say, the property that is involved in these three actions before the Court now?

A. That is right.

Q. I will ask you another question or two: All of this property [40] —there is no use talking about all the property on the large map; let us just talk about the property that is involved in the three actions—all the property that was involved in the three actions was sold and conveyed pursuant to the statute of 1868 by the Board of Tide Land Commissioners to private individuals, was it not?

Mr. Haas: Objected to as calling for the conclusion of the witness. That question is, I think, loaded with dynamite, since all the property includes other strips involved, and this man is not qualified as a lawyer to determine whether or not the various sales of blocks——

The Court: Counsel has indicated you have not laid the proper foundation for this testimony.

(Testimony of Harold E. George.)

Mr. Healy: I do not want to intrude on the Court's province either by a legal question. I will withdraw the question, with your permission.

Q. Without considering these strips that are indicated on the map as streets, how about the area between the streets, that is, the lots and the blocks? All that was sold off, was it not, to private persons?

Mr. Haas: Same objection.

The Court: If he knows he may answer.

Q. Do you know?

The Witness: I don't know for certain whether it was or not. [41]

Mr. Haas: It will be stipulated that with the exception of the market places, the lots and blocks inside the street lines were sold off to private individuals and corporations, and that the dispute is over whether or not the street areas were sold off. At least, that is contended, apparently, that they were.

Mr. Healy: I just wanted to know whether we understand each other on this. I am not asking anything about the streets now, because that is something for the Court to determine, but it is an agreed fact, is it not, Counsel, that the area between the streets, the lot and block area, was sold off to private ownership, to private owners, pursuant to the statute of 1868 by the Board of Tide Land Commissioners? That is so, is it not?

Mr. Haas: That is so, of course, subject to further evidence that we intend to put in as to the method of selling.

(Testimony of Harold E. George.)

Mr. Healy: We won't talk about the method of selling, but it was sold. Did I state it fairly and accurately?

Mr. Haas: I can't speak for the State. So far as our records show.

Mr. Healy: That is an agreed fact in the case?

Mr. Haas: Yes.

Mr. Healy: All right. That is all.

And the area that I was talking about is the area that is embraced within the confines of these three actions.

Mr. Haas: That is that portion of the area embraced [42] within the confines of these three actions——

Mr. Healy: Other than the Stanford grant.

Mr. Haas: I was going to say it was the Tide Land. We are making no claims to the central part, the Stanford grant.

I have here certified copies of deeds issued by the Board of Tide Land Commissioners, certain copies representing lots and blocks in each of the areas in the cases, together with certain certified copies of records of deeds, recorded deeds, in the office of the County Recorder of the City and County of San Francisco, which we proposed to bring into evidence as showing the method that these lots were conveyed by metes and bounds descriptions. There were several in the area embraced in each of the actions. I tender them for examination at this point. Photostating and difficulties in certification brought them to us rather late, otherwise we would have had

them in the hands of the U. S. Attorney before this so the delay would not have been necessary.

Mr. Healy: Can we look at these a little later?

Mr. Haas: That was my suggestion.

Mr. Healy: Fine. Suppose we leave them right over here.

E. B. FIELD

called on behalf of the State of California; sworn.

Q. (By the Clerk): Will you state your name?

A. E. B. Field. [43]

Direct Examination

By Mr. Haas:

Q. Your address, Mr. Field?

A. 369 15th Street, Oakland, California.

Q. Mr. Field, have you had experience as an appraiser? A. Yes, sir, 25 years.

Q. I would like you to state the type of appraisal work, and so forth, that you have done during that period?

A. I have appraised for the United States Government, various agencies, Army, Navy, Maritime Commission, the State of California, City of Oakland, Oakland Port Commission, Oakland School Board, Regional Parks, Southern Pacific, Western Pacific, Santa Fe Railways, Pacific Gas and Electric Company, many banks, trust companies, and innumerable individuals.

Q. Have you appraised in the course of that time Tide Lands of San Francisco Bay?

A. Yes, sir.

(Testimony of E. B. Field.)

Q. What knowledge have you of the values of Tide Lands in the San Francisco Bay?

A. I have been a real estate broker, buying and selling for clients, during the 25 years mentioned. We have bought and sold Tide Lands as well as, of course, other properties.

Q. You say you have testified for the United States as an appraiser, as an expert in a United States Court?

A. Many times, yes. I was on the Winehaven case. I worked for Mr. Healy in the Craig Oil Company case in Oakland; appraised the Port of Embarkation for the Army in Oakland, the shipyards on the [44] Alameda side for the Maritime Commission, Western Pipe and Steel; I appraised the San Leandro Naval Hospital for the Kaiser Yard in Richmond for the Maritime Commission; Camp Stoneman for the Army. Many of them, Mr. Haas.

Q. Are you familiar generally with the values of Tide Lands around Hunters Point?

A. Yes, sir.

Q. I direct your attention to this map, which is Defendants' Exhibit C, and calling your attention to the area thereon marked in pink, and I ask you if you have appraised the value of those areas?

A. Yes, sir.

Q. Directing your attention to the area represented in the uppermost portion of it marked by an arrow, Portion No. 22416, which represents the area so involved in Case No. 22416—

A. Yes, sir.

(Testimony of E. B. Field.)

Q. ———limited to the areas in pink, in your opinion, what is the reasonable market value of those strips?

Mr. Healy: Excuse me a moment, Mr. Field.

If it please your Honor, we object to the question on this ground: Inasmuch as the issue here is whether or not the State was the owner of these lands at the time the Government took title to them by the filing of the declaration of taking, we submit that the State as yet has offered no evidence which shows remotely or otherwise that it was the owner. We have had some evidence here about down towards China Basin, a mile and a half away, but the record, I submit, is devoid of evidence [45] that they were the owner of these streets in question in 1943 when the Government went into possession. The evidence, the Court will recall, was that they were the owner in 1850, when they became admitted as a sovereign state. Whatever the evidence was—I tried to get it from the last gentleman, but then it came by stipulation that all of these lots were sold off. The stipulation does not say how they were sold, but the statute takes care of that, and the Court has the statute before it as a matter of judicial notice. That statute says they must be sold by lots and blocks, and being lots and blocks the familiar rule of law comes in that the owner gets to the center of the street. So as the record now stands I submit there is no evidence that they were the owner in 1942 or 1943. I submit that is so, and that therefore evidence as to value would be out of place and immaterial.

(Testimony of E. B. Field.)

Mr. Haas: It was in anticipation of some such objection that I call your Honor's attention as to the provision of the statute directing the Tide Lands Commissioners to reserve streets, market places, wharf areas and similar areas for public accommodation from sale. I think if your Honor will read the statute—we have a copy here—you will see that that is necessary. I submit that you will have to construe the statute and construe it adversely in order to rule on this matter. I submit that this be let in subject to a motion to strike.

The Court: I think that probably would be the best thing. [46] I will allow it in subject to your motion to strike and over your objection.

Mr. Healy: All right, your Honor.

(Question read.)

The Witness: The property contained in Case 22416, I think the fair value as of——

Q. (By Mr. Haas): I am referring to the parcel in pink marked 2.

A. Parcel 2, 8.73 acres, $11\frac{1}{2}$ c a square foot or \$750 per acre, \$6,548.

Mr. Haas: Your Honor, I want to call attention to the fact that the green line here divides the cases.

Q. Referring next to the portion in pink numbered 3-A, the arrow pointing to that portion being 22417 on Exhibit C, I will ask you if you examined that property? A. Yes, sir.

(Testimony of E. B. Field.)

Q. In your opinion, what is the reasonable value of that portion No. 3-A?

A. 3-A contains 6.815 acres. I think it is worth $1\frac{1}{2}$ c a square foot or \$750 per acre, \$5,111.

Q. In the same case down to the right, along the right side, is the number 22147 with an arrow pointing into the parcel, and there is a parcel numbered in a circle 3-B, which extends from the boundary of an area marked "Granted to the California Drydock Company" down to a green line on the strip marked "15th Avenue." Have you examined the area represented by the portion colored in pink?

A. Yes, sir.

Q. As 3-B, and in your opinion what is the reasonable value of [47] that?

A. There are 27.1 acre. I consider it worth $1\frac{1}{2}$ c a square foot, \$750 per acres, or \$20,325.

Q. I now direct your attention to the largest apparently, the lowest group of pink strips, which has an arrow pointing to it in the lower part of the map marked 22261, representing Case No. 22261, one of the strips having a mark or a circle marked "2," that indicating it is Parcel No. 2 as described in Defendants' amended answer, and, of course, excluding the two yellow-colored blocks there, 3-A, 3-B, which are not at issue here, but limiting yourself to the portion, the strips colored in pink, I ask you, have you appraised that parcel?

A. Yes, sir.

Q. What did you find to be the reasonable market value of that parcel?

(Testimony of E. B. Field.)

A. I found 64.61 acres. I considered it worth 11½ cents per square foot, or \$750 per acre, totaling \$48,458.

Q. I ask you as of what date you set these various values? A. July 4, 1942.

Q. Did you allow the facts of the condemnation to affect your opinion of those values?

A. No, sir.

Mr. Haas: Your witness. Excuse me. May I interrupt? There seems to have been another.

Q. At that time you also appraised a parcel here unmarked at the corner of 4th Avenue, the strip marked "4th Avenue and D Street." What value did you set on that? That was, I believe, Parcel 3 in 22416. [48]

Mr. Healy: That one has been settled.

The Witness: That was eliminated by instructions, Mr. Haas.

Mr. Haas: That is right.

Cross-Examination

By Mr. Healy:

Q. You did not appraise that little piece there?

A. No, sir.

Q. Mr. Field, the figures you have just given us were as of July, 1942, did you say?

A. I may have picked the wrong date. I had a recollection it was April, was it not?

Q. I thought you said July?

A. I did say July.

(Testimony of E. B. Field.)

Q. Did you mean April?

A. I had the dates given me.

Q. Let us forget the month. Is it 1942 at any rate?

A. Yes, sir.

Q. Did you make this appraisal or investigation that led you to these conclusions as of 1942? Did you make your investigation back in the year 1942?

A. No, sir.

Q. When did you first start to contemplate upon the problems here involved and arrive at these calculations?

A. I think it was late in 1943. I may be wrong in that. When was the Hutchinson case? It was before that.

Q. The Hutchinson case was tried in January, 1944.

A. Then it was late in 1943.

Q. You were not a witness in that, were you?

A. I was prepared but not called. [49]

Q. In the course of your study of these maps and the problems involved you could observe that all this land was under about twenty feet of water or more, was it not?

A. Varying depths. That was the maximum.

Q. A maximum of 20 feet of water, and what was the minimum, Mr. Field?

A. The Coast and Geodetic Survey, as I recall, shows it runs from 10 to 20 feet generally.

Q. Approximately 10 to 20 feet under water and it has since been filled in by the United States Government in connection with the expansion at the Hunters Point Drydock, is that right?

A. Yes, sir.

(Testimony of E. B. Field.)

Q. Did you in your investigation and your study of this land come to any conclusion as to what the uplands were worth, the dry land?

A. No, sir.

Q. I do not mean far away, but I mean close by, just off the shore, let us say?

A. I made no appraisal of the property other than within the lines shown, the black lines shown.

Q. These areas that you have given us—let us take any one of these streets, like 16th Avenue. Do you know how wide that is, Mr. Field?

A. 60 feet.

Q. They are all 60 feet, aren't they, or approximately all of them, except the wider streets, like Waterfront Street?

A. Is that 60 or 66? I calculated them 60, I believe.

Q. Let us say 65 feet wide. [50]

This map, Mr. Haas, is an inch to a hundred feet, isn't it? Take, for instance, 17th Street. That would be a long narrow strip 40 inches, 4,000 feet long, by 60 feet wide.

Q. Is that right?

A. I have not scaled it.

Q. Mr. Haas stood here. It seems to be that, does it not? 40 inches. Each inch is a hundred feet. 4,000 feet. Let us just take 17th Street, Mr. Field, from C Street as far out as the waterfront there. That is an area about 60 feet wide and 4,000 feet long. Just take that segment. What utility would that have?

(Testimony of E. B. Field.)

A. Well, if I neglected to state as part of the whole, it was so obvious, that was the reason for neglect.

Q. Pardon me, sir?

A. If I neglected to state that my figures are based on the areas as part of the whole, it was so obvious I apologize for not so stating it.

Q. You know you need not apologize. I am just asking you if you will, sir, to consider one street, 17th Street, an area about 60 feet wide and about 4,000 feet long. Let us consider that and forget the rest for the moment, if you will, and tell us what utility it would have to anybody being out there, 10 feet to 20 feet under water?

Mr. Haas: Objected to.

The Witness: The use to which it is being put now.

Mr. Healy: I mean in that condition before it was filled in?

A. Are you asking me to say as a pipe line? [51]

Mr. Haas: Just a minute, Mr. Field. Objected to on the ground he has testified he appraised the parcels as a whole and not in small parts. You can cut a small piece off any piece of property and say, "What is that piece worth?"

Mr. Healy: I do not want to be unfair, but I think a little cross-examination should be permitted.

Mr. Haas: That is quite agreeable with the gentleman, but I think it should be revelant. The value of one single portion of those strips represents the same thing that was brought out in the Hutchin-

(Testimony of E. B. Field.)

son case. It is the value of the entire grid there, these various parcels, taking in cognizance the fact that they are all under State ownership and all of them have access around the edges, which gives them value.

The Court: I have done violence to this record already, so I can't do much harm. I will allow it subject to a motion to strike and over your objection.

Mr. Haas: Please note an exception.

Q. (By Mr. Healy): Will you answer the question? A. A parcel 60 feet wide——

Q. And about 4,000 feet long?

A. As part of the whole in the use to which it is being put now or any other uses? As part of the whole. If you are trying to get me to say a pipeline or a single wharf, I will say that.

Q. I do not want you to say anything you are reluctant to say. Just go back to 1942 when it was under water and before the [52] Government had filled it. That street alone there could be put to what utility?

A. As part of the whole, the use to which it was being put or——

Q. Let us look at that street, for instance.

The Court: It would be a good fishing pond.

The Witness: Or a dock or a pipeline. I took into consideration, Mr. Healy——

The Court: The acreage?

The Witness: Yes, sir. I took into consideration the many pieces sold, isolated, that was to be made part of the whole.

(Testimony of E. B. Field.)

Q. (By Mr. Healy): When you put them all together you have a checkerboard affair, as depicted on the map separate by these areas in white that belonged to various property owners?

A. I also took into consideration, Mr. Healy, the Hutchinson award of Block 207, I believe in court here, which was isolated, and the Newhouse award.

Q. That was upland, wasn't it?

A. Yes, just barely over the line, also isolated.

Q. I was not asking you what you took into consideration. All I asked you was about 17th Street, what utility it could be put to, and you told us. Now I will ask you the other question: What utility could all these long, narrow streets, fit for pipelines, be put to?

A. None whatever, except as I have explained before, part of the whole. [53]

Q. Well, if you put them all together as they there existed, could you put these strips in pink to any utility? Could you do anything with them then in 1942?

A. Well, they were put to use. They are in use today.

Q. The Government put them to some use when it filled them in, but as they then existed, before the United States Government filed these condemnation actions, could you put those pink strips to any useful purpose?

A. It is speculative. There have been such areas filled and in use.

(Testimony of E. B. Field.)

Q. It is speculative, though, is it not?

A. Yes.

Q. And that would be true, pointing to this area in pink in the lower portion of the map which is involved in Case 22261, the same answer would be with respect to the other two cases 22416 and 22417?

A. As part of the whole for the use or similar use to which they were being put, the value given.

Q. The value what?

A. The value given.

Q. The value given. I am just asking you about utility now, what you could do with them. It is still speculative, is it not, Mr. Field?

A. As single strips, yes.

Q. No, put them all together as they there existed. It is still speculative what you can do with them?

A. No, no, I think—it was speculative, as I understand, in the early days from Montgomery to the bay, but that property was put to use.

Q. Those were big pieces of land. I do not want to take too much of his Honor's time. I will ask a couple of questions and [54] if we can't get by, I will cease. I just want you to consider that area in pink there as it exists, not isolated, but the area as it exists, this pink strip, this one, this one and this one, and the cross streets, C Street and China Street; put them all together, assemble them as they there exist on the map: Can you tell us what utility they could have been put to in 1942?

A. As part of the whole.

(Testimony of E. B. Field.)

Q. I do not mean as part of these white strips. That is not part of the whole?

A. That is the reference to which I made constantly, as part of the blocks, yes.

Q. You mean as part of the whole including the white? A. That is right.

Q. But when you just have them in the pink portion there is no utility, is there?

A. Pardon me, Mr. Healey. I am not trying to argue, but they are put to use as part of the whole today.

Q. Today they are, but back in 1942. We are not talking about the white. We have paid the people for the white. I am talking about the pink as it there exists, the whole of the pink?

A. Not singly in my opinion, only as a part of the entire area.

Q. When you say the entire area, you mean the white? A. Yes, sir.

Q. And the white are the blocks. You understand, do you not, if that land were to have been filled in and raised up to above the water level, that these various people who back in 1868 and [55] the succeeding years purchased these blocks would have the right to those avenues as streets, public streets and avenues, do you not, sir?

Mr. Haas: Objected to as calling for the conclusion on a matter of law, which he is not qualified to give.

The Court: If he knows, he may answer.

(Testimony of E. B. Field.)

Mr. Haas: May we have an exception?

The Court: Note an exception.

Q. Do you know? A. No, sir.

Q. (By Mr. Healy): I am not asking you as a law question. I do not mean to traverse upon any law point or anything like that, but if they were filled up to above the level of the water—these lots; I am not talking about the streets—the lots have no utility whatsoever unless they have a street access; that is axiomatic, is it not, Mr. Field?

A. Yes.

Q. So in order for the lots to have any value at all these streets would have at least been permitted to be opened, isn't that so?

A. I doubt if there would be any filling for single blocks. It would be a large project, just as has taken place.

Q. I am sorry. I did not make myself clear. Let me repeat the question. I said if this area were filled in, in order for the white area, that is, the blocks, to have any utility, you would have to have streets down through them to permit access thereto, would you not? A. One street. [56]

Q. One street each. Well, in about the balance as it is depicted on the map, isn't that about it?

A. That I couldn't say.

Q. And that is a pretty fair plan, isn't it, in your experience as a real estate subdivider and in your experience for blocks—what are they, 200—

A. 200 by 600.

(Testimony of E. B. Field.)

Q. As a matter of fact, you really should have more street area, isn't that so? They do not make blocks now 200 by 600. They are generally smaller, aren't they?

A. It depends upon the terrain. No one can quarrel with the checkerboard supposition, if that is what you mean.

Q. That seems to be about right to have about that many streets in that many blocks, is that correct?

A. Yes, but may I explain my answer to you, Mr. Healy? I know of no case where a development of such expense would be justified to provide an industrial lot of 200 by 600. It would have to be as a whole. In other words, what you are saying, I presume, is a bulkhead where the fill is pumped in or you are bringing it in. I pictured the whole area as a large industrial or waterfront development, and that was in my opinion the only thing that would justify filling.

Q. My question is—I believe you have answered it, though—if it were raised by a fill-in, this block area as depicted in white would have no utility unless you had streets in about the [57] manner as depicted on the map, and I believe your answer was that that was correct?

A. That is right.

Q. When that would come, if that day ever did come, whatever value would be ascribed to the streets would be reflected in the value that a competent appraiser would put on the lots and blocks, isn't that so?

(Testimony of E. B. Field.)

A. I do not think I could picture that being filled in as a block subdivision. It seems too ridiculous to me I can't imagine how it would come about.

Q. I am just asking you this: Isn't it a fair statement, Mr. Field, that if this property were filled in—and it was filled in in many places along the waterfront, was it not, right here on Montgomery Street, as you said? A. That is right.

Q. Is the value at that date when the thing would be filled in, whatever value might be ascribed to the streets would be reflected in the enhanced value of the lots, isn't that so?

A. If that should come about I do not think there is any question of it, yes.

Q. That is so, is it not? A. Yes.

Q. And then the streets amount to about nothing or not more than a dollar, isn't that so?

A. No, are you talking about closing the streets?

Q. I am talking about value.

A. Streets for the general use of the public are certainly not salable and have no market value.

Mr. Healy: That is all.

The Court: We will take a recess.

(Recess.) [58]

The Court: I thought you gentlemen were through with this witness?

Mr. Healy: I have no further questions.

Redirect Examination

By Mr. Haas:

Q. Mr. Field, several times in your testimony,

(Testimony of E. B. Field.)

in answer to questions directed to you by Mr. Healy, you referred to values as speculative; just what do you mean by that term?

A. I mean that property was subject to large development, filling, backs brought in and other improvements for use in an industrial area, and I use "industrial area" as factory close to the center of the population, a good labor market, and attracts deep water which can be brought adjacent—like the old Union Iron Works plant, or Hunters Point, so the factors of cost were involved. So, if one large industrial area was made, it was speculative.

Q. You gave certain values in answering questions as to the reasonable market value. What do you mean by reasonable market value in that connection?

A. The value which, in my opinion, the property was worth, subject to the amount of money to be added to show the comparable use with other similar areas.

Q. Suppose this entire area had been reclaimed; what would you say the value would be?

A. In getting into such high values of land, then you would not take it with an overall average such as I have done.

Mr. Healy: Pardon me, I think that on direct examination [59] or redirect examination, that is not material. On direct we just did not have a situation of reclaimed land, so I object to the question as calling for the opinion of the witness on a condition which did not exist.

(Testimony of E. B. Field.)

Mr. Haas: On *direct* you can bring up any matter that was brought up on cross-examination.

The Court: I will allow it subject to a motion to strike.

The Witness: I think the waterfront property, itself, back up possibly eight or nine hundred feet, which would be \$40,000 an acre, or \$1 per square foot; and as it fades back, \$30,000 per acre, or 75 cents per square foot; further back, \$20,000 per acre, or about 50 cents per square foot.

Q. (By Mr. Haas): You refer to the Hutchinson property, which was the subject of one of the previous trials of this action. That is block 708, is it not? A. Yes, sir.

Q. Taking that as an isolated block as it is, what utility would that have? You will note, and may we have your scale, Mr. George?

Mr. Healey: We object to that question as being incompetent, irrelevant, and immaterial. On direct examination or redirect, it serves no useful purpose to go into that. That was not proper on direct or redirect. It may be proper on cross-examination, but I don't believe we asked about it.

Mr. Haas: That was the same proposition brought up when there was an attempt to take up the State's ownership on a [60] little piece, by taking out a little slice from the State.

The Court: I will overrule the objection subject to a motion to strike.

A. This place is 200 feet on Tevis Block, 285 and 1 inch on Thirteenth; 217 plus on Waterfront; 370 on Nineteenth Street. That is 65 square feet.

(Testimony of E. B. Field.)

Q. (By Mr. Haas): What utility would that have in connection with the surrounding property, or alone?

A. None, only as a part of the whole.

Q. United States Government, as I understand, settled for a fair amount for that place?

A. 3.7—

Mr. Healy: We object to that question and move to strike the answer.

The Court: It may go out.

Mr. Haas: That's all.

Recross-Examination

By Mr. Healy:

Q. Mr. Field, you spoke about large developments or developments of large areas for industrial purposes. It is a fact, is it not, that in the City and County of San Francisco, there are only three or four areas—withdraw that.

These areas here between the streets, being 200x600—that is about 125,000 square feet, is it not? A. Exactly.

Q. And 125,000 square feet is almost three acres? A. Almost three acres, yes, sir.

Q. So each one of those places would be about 3 acres? A. Yes. [61]

Q. How many industrial sites are there within the City and County of San Francisco of 3 acres or more?

A. There are a number of them—many—not available today, however.

(Testimony of E. B. Field.)

Q. But I mean in existence.

A. In use, many, many of them.

Q. Isn't it a fact there is something like less than half a dozen? A. In use?

Q. Yes.

A. In the City and County of San Francisco?

Q. Yes. A. Oh, no.

Q. You think there are more?

A. Many, many more.

Q. Three acres, now? A. That's right.

Mr. Healy: That's all.

The Court: Step down.

A. P. WALL

called as a witness on behalf of defendants; sworn.

The Clerk: Will you state your name?

A. A. P. Wall.

Direct Examination

By Mr. Haas:

Q. Mr. Wall, you were subpoenaed, were you not, to bring in all the records of the case numbered 43106?

A. The County Clerk was subpoenaed; I was sent down with the records.

Q. That is what you have handed me?

Mr. Healy: What are these, now, Counsel?

Mr. Haas: These are the records in the case of the People of the State of California in relation of the State [62] Board of Harbor Commissioners in the India Basin Case, which contained, on the basis,

(Testimony of A. P. Wall.)

from the private owners and others, a portion of these tide lands which are included in that map and concerning which the United States claims the State does not have title. That portion I will identify roughly on the map, because I expect by testimony to put it into the record, which is a portion of the tide lands which the State achieved in the same manner as it is out on the water, and concerning which there was litigation with the City and County of San Francisco as a part of the condemnation. Again, I wish to offer proof by Mr. George—no, I won't call it proof, but your Honor will take judicial notice of the effect of the records when they are in. The relevancy of the records is to bring out a portion of the tide lands included on this map and which the United States appears to contend were granted by certain Acts of 1872 to the City and County of San Francisco, that necessarily, in the condemnation by the State, and holding by the Court that the City and County of San Francisco was without title to the streets or the market place makes that question *res adjudicata*, at least, as to the City and County of San Francisco, and constitutes a construction of the granting act which throws further light on that act. I expect to bring all this up in the argument on the law.

The Court: What is the record date of the case?

Mr. Haas: The complaint was verified on the 29th of June, [63] 1912, long after any of these granting acts, and long before this litigation, so that it constitutes an excellent construction of the granting act.

(Testimony of A. P. Wall.)

The Court: For the purpose of the records, what is the purpose of this?

Mr. Haas: The purpose of this is to afford light on the construction of the statute, the two acts of 1872 which, claim has been made, granted these streets to the City and County of San Francisco.

The Court: For that limited purpose I will overrule the objection subject to motion to strike.

Mr. Healy: May I note an objection.

The Court: You may note an objection.

Mr. Healy: This is a complaint filed, Mr. Haas, in a Superior Court action?

Mr. Haas: It is not the complete file. It is all they have. We expect to supply the answer of the City and County of San Francisco. But, inasmuch as that disappeared, I would like to examine this man to develop that.

Mr. Healy: Before you do that, may I ask this preliminary question? Is that dealing with the land around the India Basin condemnation?

Mr. Haas: The actual property was condemned was the area from Islais Creek to India Basin, and from Waterfront Street to what was then First Avenue. [64]

Mr. Healy: Does it affect any of the land we are interested in in these three actions?

Mr. Haas: Vitally, inasmuch as it states they had in these three actions——

The Court: You limited that to the interpretation of the statute of 1872.

Mr. Healy: What I meant, is that it doesn't involve this same land, except by inference.

(Testimony of A. P. Wall.)

Mr. Haas: It is the contention of the State that all those portions included in the granting status are subject to the same construction, and it is just the old proposition, you have a deed that grants several parcels of land. The construction of that deed in connection with any one of the other parcels is a construction as to all.

Mr. Healy: Was the United States a party to those actions?

Mr. Haas: It was not.

Mr. Healy: We object to the introduction of those documents as being incompetent, irrelevant, and immaterial.

Mr. Haas: We contend the Federal Courts take judicial notice of the California law, that it is only because this is a court of record, a Superior Court action, that it is necessary that they be formally introduced, and they are the best evidence of the California law in this particular respect. [65]

The Court: I will allow them in subject to a motion to strike, and overrule the objection.

Mr. Healy: I think, your Honor, we should not overburden the record with these very old and voluminous documents.

Mr. Haas: I think we can probably stipulate, to shorten them somewhat after they are in, but I want to develop what part of the file is here.

The Court: Are you familiar with the file?

A. I am not familiar with the file except it is part of the original file, and it is all that is now available.

(Testimony of A. P. Wall.)

Mr. Haas: It is all that is now available of the original records of the County Clerk's Office.

The Court: What is absent, if you know?

A. I couldn't say. You would have to consult with Mr. Munson, who is the chief clerk.

Q. The fact that Mr. Munson is the chief clerk does not indicate to me that he knows any more about it than you do. This is a portion of the record. Let it go in.

(File marked Defendants' Exhibit G.)

Mr. Haas: I will have to ask the County Clerk to be here, unless it can be stipulated that this is all the records they have.

The Court: Was the County Clerk subpoenaed, do you know?

A. The subpoena is here, if the court please, directed to the Superior Court of the State of California in and for the City [66] and County of San Francisco.

The Court: Is the Clerk, himself, so important that he can't come?

A. It is customary to send one of the deputies, if the Court please.

The Court: In any event, the record is not here and it is only a portion of the record. This witness cannot give you any more information.

Mr. Haas: Possibly it can be stipulated. The only purpose of getting further testimony is——

The Court: I will accept the stipulation after you excuse this witness.

Mr. Haas: I will have to excuse him.

The Court: Between now and tomorrow morning, I would like to have you enter into whatever stipulation you can.

HAROLD E. GEORGE

recalled as a witness for defendant; previously sworn.

Direct Examination
(Resumed)

By Mr. Haas:

Q. I am recalling you, Mr. George, in connection with presenting certain facts in connection with this record which has just gone in. Mr. George, I have the complaint here in the action in which there is a description in Count II of that complaint,

“Commencing at the intersection of the waterfront line of September 12, 1877, with the southerly line of Islais Street, and extending southeasterly along [67] the said waterfront line to its intersection with the northerly line of India Street; thence westerly along said northerly line of India Street to its intersection with the southwesterly line of First Avenue South; thence northwesterly along said southwesterly line of First Avenue South to its intersection with the easterly line of Kentucky Street; thence northerly along said easterly line of Kentucky Street to its intersection with the southerly line of Islais Street; thence easterly along said line of Islais Street to the point

(Testimony of Harold E. George.)

of beginning, and containing all the blocks and parts of blocks and streets within the above-described boundaries.”

Did you locate that description on a map?

A. Yes, sir.

Q. What map?

A. I don't know. We have it here.

Q. Could you locate it now on the main map?

A. India Street is the street immediately north of the India basin. First Avenue runs diagonally, northwest from the corner of India Basin to Islais Creek Channel. Islais Street is a street immediately south of Channel. It runs, then, east to Waterfront Street, which approximately, very approximately parallels First Street and goes back into India Basin.

Q. Is that part of the property which the Tide Land Commissioners, by the Statute of 1868-9, were instructed to survey into lots and sell the lots?

A. Yes, sir, it was outside of what you would call the actual water line of the bay. [68]

The Court: What do you mean by the water line of the bay?

A. Where the water met the dry land, now known as mean high tide.

Q. (By Mr. Haas): Mr. George, during the noon hour I showed you and you read the case of *People vs. Williams*, heretofore mentioned by the Attorney for the United States. Can you identify the area involved in *People vs. Williams* on either

(Testimony of Harold E. George.)

or both of these maps, one being Defendant's Exhibit B and the other being Defendant's Exhibit D.

Mr. Healy: I object to that as calling for the legal conclusion and opinion of this witness. If you can point out some description here, bring it out that way.

Mr. Haas: Yes, all right.

Q. The first location there mentioned is Channel Street, between Fourth and Fifth Streets, in the City and County of San Francisco.

Mr. Healy: Where are you reading?

Mr. Haas: The opening lines of the opinion in *People vs. Williams*. This is Volume——

Mr. Healy: All right, I found it.

Mr. Haas: What page is it in the California Reports? I have the Pacific edition.

Mr. Healy: 498. It is 64 Cal. at page 498.

Q. (By Mr. Haas): "Channel Street between Fourth and Fifth Streets in the City and County of San Francisco." [69] Will you show his Honor where that is located on this map?

A. Channel Street is the street adjoining the canal which runs shoreward, you might say, from China Basin, and Fourth and Fifth Streets, I believe, are the same streets as they are in San Francisco today.

Mr. Haas: Let the record show the witness is pointing to Defendant's Exhibit B.

Q. How many blocks from China Basin on Exhibit B is Channel Street, between Fourth and Fifth Streets? A. One long block.

(Testimony of Harold E. George.)

Q. Now, I will ask that you point out to his Honor on this map, which is Defendants' Exhibit D, which contains portions of the railroad grant marked in yellow on the block where that same location of the block between Channel and Fourth and Fifth Streets is.

A. That would be the area right here, fronting, or between Block 17 and Block 52, and it being labeled as a market place.

Q. And that is with respect to those marked in yellow in what direction? A. It is northwest.

Q. And how close to them? A. Adjoining.

Q. Adjoining those blocks marked in yellow?

A. Yes.

Mr. Haas: That's all.

The relevancy of this testimony will be brought up in the argument on the law. The only point to be made there, your Honor, is that Channel Street Basin will be shown by the official map, and by the record of the Legislature, which [70] will be brought up in the course of the briefs, is not under the jurisdiction of the Board of Tide Land Commissioners, or never was subject to sale.

Mr. Healy: What was that?

Mr. Haas: Was never under the jurisdiction of the Board of Tide Land Commissioners, or never was subject to sale. That is the relevancy of that, because it may be brought up again in the briefs.

Mr. Healy: But it is included on this map.

Mr. Haas: But it is not part of the Tide Land Commissioners' jurisdiction. That is the theory

(Testimony of Harold E. George.)

of the State in this matter. We don't have to argue the law at this point.

The Court: Is that all from this witness?

Mr. Healy: I have just one question, your Honor.

The Court: Proceed.

Cross-Examination

By Mr. Healy:

Q. Counsel asked you to identify upon the map a description which, I believe, he read from the complaint in this case of the People of the State of California vs. Santa Fe Land Improvement Company, and you identified it for the court as this area between India and Kentucky and Channel and Waterfront. A. Yes.

Q. How far is the closest portion of that area to any of the land the State is claiming it is occupying in any one of these [71] three actions.

A. About a half a mile.

Q. About a half a mile?

A. About half a mile.

Mr. Healy: That's all.

Mr. Haas: The State's case will be complete except we still have to stipulate, or get the County Clerk to bring in the answer of the City and County of San Francisco in connection with this file. It is missing.

I have here a series of deeds from the Tide Land Commissioners to various owners, some certified copies of the record in the City and County of San

Francisco on appeal, dated prior to 1872, showing the actual form of conveyance by the Tide Land Commissioners to the lot and block owners. I would like to read them in as exhibits, or rather ask that they be deemed read into the record as exhibits.

The Court: What is the purpose of this offer?

Mr. Haas: The purpose of this offer is to show that the deeds made by the Tide Land Commissioners to the buyers of the lots all describe the lots and blocks by the interior boundary of the street up to the property line, and not to the center of the street.

Mr. Healy: We object to those on several grounds; one, I think that counsel only has three or four here.

Mr. Haas: I think there are about a dozen; three or four in each group.

Mr. Healy: All right, a dozen. We don't know, first [72] of all, if he takes a dozen original deeds to a dozen of these lots what the situation would be as to the remainder, because there are hundreds of them, I take it. Secondly, and most important, it doesn't make any difference what the form of the deed is, because the Act of 1868 that I already called to your Honor's attention, and which I read a portion of, provided that the Tide Land Commissioners were to sell them by lots. If the Tide Land Commissioners fell down in their duty in any way—I am not saying that they did—but I say if they did, there would be read into the deeds, by operation of law, the full benefits and provisions of the

statute behind it. That is the law of the State. I cite to your Honor many cases, but just taking one case——

The Court: I think counsel will agree with you.

Mr. Healy: It is read into it.

The Court: Yes.

Mr. Healy: It is part of the law. The disposition of State lands is one entirely of legislative control and the law enters into and becomes part of the contract with the State. So, aside from these deeds, we must look at the statute which authorizes the Tide Land Commissioners to sell and dispose of land, and to sell and dispose of the land in a certain manner, and under the law a public officer is presumed to have done his duty, sold and disposed of the land by lots and blocks, and having sold [73] and disposed of the land by lots and blocks, the streets to go with it.

The Court: I am prepared to rule, gentlemen. I will allow them to go in subject to a motion to strike, and the record will note your exceptions so that the Circuit Court may know where they are and all about them.

Mr. Haas: For the record, I want to point out——

Mr. Healy: They are entered now.

Mr. Haas: I understand that, but the only evidence in is that the State was the original owner, and even in bringing these in, we have stipulated the blocks excluded the streets; that is, we have not stipulated on the streets being granted out. So far, there is no presumption that even the blocks

have been granted. These are being put in to clear the atmosphere.

The Court: Everything you have put in so far is so remote I have difficulty in following you.

Mr. Haas: I think in the briefs we will be able to make that clear.

The Court: I will give you every opportunity.

Mr. Haas: I suggest we give this an exhibit letter. First will be Exhibit H, and then H-1, and so forth.

The first is a certified copy of the Tide Land Commissioner deed dated September 20, 1869, identified as No. 1325, relating to a lot in 22416. [74]

(The deed was marked Defendants' Exhibit H.)

Mr. Haas: The next is also in the case 22416, and is a certified copy of a deed to lots 11, 12, 17, 18, of Block 34.

(The deed was marked Defendants' Exhibit H-1.)

Mr. Haas: In case 22147, the next is a certified copy of a deed dated September 17, 1869, identified as 1317, conveying lots 10 to 19 of Block 1711.

(The deed was marked Defendants' Exhibit H-2.)

Mr. Haas: Also in case No. 22147, the next is a certified copy of a deed dated September 17, 1869, No. 1287, conveying lots 1 to 5 and 24 in Block 711.

(The deed was marked Defendants' Exhibit H-3.)

Mr. Haas: Now, also, a certified copy of deed dated January 5, 1871, identified as New Series 140, relating to title to lots 1 to 5 inclusive, and lot 24 in block 711.

(The deed was marked Defendants' Exhibit H-4.)

Mr. Haas: In case No. 22147, a deed dated September 17, 1869, identified as No. 1268, relating to lots 8 and 15 of block 35.

(The deed was marked Defendants' Exhibit H-5.)

Mr. Haas: Also, in case 22147, a certified copy of deed dated September 17, 1869, identified as 1269, relating to lots 9 and 14 in block 35.

(The deed was marked Defendants' Exhibit H-6.) [75]

Mr. Haas: Also, certified copy of record of deed relating to lots 10 and 19 in block 711, Nathaniel Holland, being the grantee.

(The document was marked Defendants' Exhibit H-7.)

Mr. Haas: Also, in case No. 22261, certified copy of deed to 24 lots numbered 1 to 24, inclusive, at block 765, the grantee being William H. Hencken.

(The document was marked Defendants' Exhibit H-8.)

Mr. Haas: Also certified copy of deed dated September 15, 1869—withdraw that.

Also, certified copy of deed to lots 1 to 8 inclusive, from 21 to 24, inclusive, in block 764. This is case No. 22261, and the grantee is Edward Schwerin, and Henry Schwerin.

(The document was marked Defendants' Exhibit H-9.)

Also, in case No. 22261, certified copy of deed, lots 21 to 24, inclusive, in block 713, the grantee being Matthias Jessin.

(The document was marked Defendants' Exhibit H-10.)

Mr. Haas: Also in case 22261, certified copy of deed for block 358, lots 1 to 8, and 21 to 24, inclusive, the grantee being John Appel.

(The document was marked Defendants' Exhibit H-11.)

Mr. Haas: Also, in case 22261, grant of block 732, the grantee being H. P. Jones.

(The document was marked Defendants' Exhibit H-12.) [76]

Mr. Haas: Also, for the record, I call the court's attention that these are all deeds from the Tide Land Commissioners to the original grantees and show the form of deed made by the Tide Land Commissioners.

The Court: Indicate again for the purpose of the record the purpose of this offer.

Mr. Haas: The purpose of this offer is to show that the conveyances of the blocks and lots by the

Tide Land Commission, all describing the properties conveyed by the boundaries of the street closest to the lot, did not purport, at least, to convey to the center of the street.

There are twelve deeds which, for the purpose here offered, ranging from one or two up to three or four in each of the cases. We offer them as showing the form used by the Commission in those cases, and rest on the presumption that offer is regularly performed and *the* course of business is here shown by the form of these deeds, the performance being in the absence of other proof, similar blocks were in similar form.

The Court: What relation has that to the issues here involved?

Mr. Haas: The question of the ownership of the streets—well, not the ownership of the streets, but of the strip areas reserved originally for streets.

Mr. Healy: May I ask a question? Some of these deeds [77] are typewritten in form, and some of them are obviously photostats of the original. Are the typewritten ones copies taken off of the recorder's records?

Mr. Haas: Yes, this was a rather painful search. Some were taken from the records and are photostatic copies certified by the Recorder of the records in his office showing the original grant of the Tide Land Commission as to these boundaries. And others were in the possession of the State. When the lot owner could not pay up, or under other contingencies the deeds were turned in to the State Treasurer for cancellation, and the result was that

there were some bales of these deeds in the State Treasurer's office, among the clerical offices of the State Land Division, who ran down a few, such as they could, showing the forms. That is why some are photostats and some are originals.

Mr. Healy: That is, these that are typewritten and which, as I suggested, and you agreed, are apparently taken off of the County Recorder's records, and dated 1907, which is after the fire. I was informed all the records over there were burned so you could not get any of the records as of that time.

Mr. Haas: That is correct. These, however, will be shown to be a re-recording of an original deed in each case.

Mr. Healy: One reads, "A true copy of the original, recorded at the request of Charles Parnell, 1907." [78]

Mr. Haas: These are copies of the originals and brought in and recorded after 1907, but are copies of the original deeds.

The Court: Keeping in mind the condition existing at that time, that is the only thing that could have been done.

Mr. Healy: Are each of these deeds the same in form, as far as you know?

Mr. Haas: Yes, as to the description in each case, being metes and bounds descriptions, going to the center line of the streets.

The Court: Mr. Wall, you may get some idea from your chief about this.

Mr. Wall: I did not, myself, make a personal search for these records.

The Court: Maybe you can get a stipulation from the Government.

Mr. Haas: I think we can. All we want to do is introduce a copy of the answer of the City and County of San Francisco. We want to do that in order to show that the issue is litigated.

Mr. Healy: Do you have a copy?

Mr. Haas: I have a copy taken from the City Attorney's records.

The Court: Well, in any event, it is time for adjournment. We will have this expert from the City Hall here tomorrow, who [79] will assist us.

We will adjourn until 10:00 o'clock tomorrow morning.

(An adjournment was taken until tomorrow, Wednesday, June 26, 1946, at 10:00 o'clock a.m.)

Certificate of Reporter

I, Joseph J. Sweeney, Official Reporter, certify that of the foregoing, 22 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing, to the best of my ability.

/s/ JOSEPH J. SWEENEY.

Certificate of Reporter

I, Fred J. Sherry, Jr., Official Reporter, certify that of the foregoing, 57 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing, to the best of my ability.

/s/ FRED J. SHERRY, JR.

Wednesday, June 26, 1946, 10:00 o'Clock A.M.

The Clerk: United States of America vs. Land in the City and County of San Francisco.

Mr. Haas: After our disappointment with the Deputy County Clerk last night, your Honor, Mr. Healy has kindly stipulated that this may be made a part of the file which was submitted with like effect as if it were an original. This is the answer of the City and County of San Francisco.

The Court: It will be admitted and marked next in order.

Mr. Healy: We would like to urge the same objection to this document that we did to the balance of the file. We make no objection that it is not the original, because Counsel has assured us that it is a copy of the original that was filed, but we would like to object to it on the ground that it is incompetent, irrelevant and immaterial, as we did to the balance of the file.

The Court: Let the record show an objection. It will be overruled. I will allow it in subject to the motion of Counsel to strike.

Mr. Healy: Is that all?

Mr. Haas: That is all. We rest subject to rebuttal.

Defendant rests.

Mr. Healy: May it please your Honor, at this time, since the State has rested, I feel it my duty to move the Court for [80] an order dismissing the claim of the State as set up in their answer, in that there is a total failure on their part to prove that

they had any interest in the land in question. I can argue that more extensively, but I think we discussed it as we went along yesterday and the Court probably has our views in mind, that although they owned the lots in 1850 when the State of California became a sovereign state, by the statute of 1868, the Board of Tideland Commissioners was granted the authority to sell, to first survey and then to make a map and to sell by lots, and they have divested themselves of all title in and to the lots, and I therefore urge upon your Honor at this time to make an order dismissing their claim as set up in their answer in that there is no evidence showing or tending to show whatsoever that they have any compensable interest in or to the land involved in these actions.

The Court: For the purpose of the record the motion will be denied.

Mr. Healy: Then may we proceed with our proof?

The Court: Yes.

Mr. Healy: And our proof, may I say, will consist of the testimony of two witnesses as to value.

JOSEPH J. PHILLIPS

called on behalf of the plaintiff; sworn. [81]

Direct Examination

By Mr. Healy:

Q. Would you state your name, please?

A. Joseph A. Phillips.

(Testimony of Joseph J. Phillips.)

Q. Mr. Phillips, what is your business or occupation?

A. Director of Property for the City and County of San Francisco.

Q. How long have you held that position?

A. Since January 8, 1932, and prior to that time I was Chief Right of Way Agent for the City from 1915. Before 1915 I was an appraiser on building construction and lands for various projects acquired by the City.

Q. As Property Director of the City and County of San Francisco, do you have occasion to buy and to sell property in your official capacity?

A. I do.

Q. Just very roughly, if you can, tell the Court about how much property you have purchased for the City and County?

A. In excess of one hundred million dollars.

Q. You have been in that position since 1932, you say?

A. As Director of Property, but I bought property for the City prior to that, from 1912 on.

Q. Have you had occasion to make appraisals for private organizations, banks, trust companies, railroad companies and the like?

A. I have always made it a point only to appraise for governmental agencies. I have done a great deal [82] of appraisal work for cities, municipalities, state and federal government.

Q. Did you have any experience in organizing the East Bay Municipal Utility District?

(Testimony of Joseph J. Phillips.)

A. Yes, I organized the Right of Way Department of the East Bay Municipal Utility District and furnished them with one of my men, who took charge of the work there and handled it for them.

Q. Are you familiar, generally speaking,—generally first—with land values, values of real property in and about the City and County of San Francisco? A. I believe that I am.

Q. Are you familiar with the territory that we generally speak of as the Hunters Point Region?

A. Very familiar with it.

Q. Have you made any particular studies of that area and, if so, tell us briefly to what extent?

A. I have purchased several parcels for the City in that south basin. In addition to that, in 1939, I appraised the drydock, which was purchased by the Government, I understand, on my figure. After that for the Federal Government I made quite a number of appraisals, one on April 25, 1942, and another one in July of 1942, which embraces all of the land now here in question—April 8, 1942, and July 25, 1942.

Q. Are you familiar with this map we have here on the board, the map of salt marsh and tide lands? A. I am.

Q. Have you also familiarized yourself with the segment of it that has been enlarged and produced here by the State? [83] A. I am.

Q. Discussing this with his Honor, would it be easier for you to point to the large one or the regular one?

(Testimony of Joseph J. Phillips.)

A. It doesn't make any difference, whichever his Honor desires.

Q. You did make an appraisal for the United States Government in 1942 of the land in question, didn't you?

A. That is correct.

Q. Did you make more than one appraisal, there being three cases here?

A. Yes, I made five or six appraisals, maybe more, taking in the entire area reaching over to the Southern Pacific Railroad.

Q. You were in court yesterday?

A. Yes, sir.

Q. And you heard the discussion, so you are generally familiar with this. Withdraw that. You are familiar with this enlarged map?

A. Yes, sir.

Q. I suppose in your appraisal you appraised the areas within the blocks, too?

A. I did.

Q. And the bulkhead areas and the other areas, market areas, and so forth, which we are not concerned with; we are just concerned with the areas in pink. Just take a look up here at what is denominated on this exhibit, Defendants' C, this area that is denominated in Action 22416 as Parcel 3-A. What in your opinion is the value of that area?

A. One dollar.

Q. And depicted there in pink?

A. One dollar.

Q. What about this one immediately to the north of it? I will [84] withdraw that. I gave you the wrong number. That is in Action 22147. What is your opinion as to that?

A. One dollar.

(Testimony of Joseph J. Phillips.)

Q. How about this parcel No. 2 in Action 22416?

A. One dollar.

Q. How about this other area further to the southeast in Action 22147, which is depicted as—just a moment. Do you call this 3-B or 2, Counsel?

Mr. Haas: This is 3-B of 22147; at this point it becomes 2 of 22261.

Q. (By Mr. Healy): This area 3-B of 22147?

A. One dollar.

Q. And this one, 2, of 22261?

A. One dollar.

Q. Now, you have given his Honor your opinion as to the value of those areas. Will you be good enough to explain to his Honor some of the reasons that entered into that opinion that you just gave?

Mr. Haas: That is objected to on the ground that the statement of reasons must, I believe, be on a specified basis.

Mr. Healy: We have been doing it for as many years as I can remember in this court. The expert is entitled to give the reasons for his opinion.

Mr. Haas: Objection withdrawn.

Mr. Healy: Would you answer the question?

A. Originally land is purchased in large acreages, and when there is demand on the part of the public for the purchase of that land, it is naturally subdivided. The subdivider lays out those tracts into what he believes is the best size lot and [85] block for the particular need at that time. He files a map showing streets, so that access can be obtained to all of these blocks which he disposes of,

(Testimony of Joseph J. Phillips.)

and as a result of that, the value that was in the area taken by the streets is absorbed by the land that is sold plus an additional value to that land. If there was not an additional value there would be no object in the man subdividing it, because he could just as well sell it off in acreage, so the appraiser must take the position, and it is borne out by the facts, that the value of the street is absorbed into the value of the property sold plus an additional value.

Mr. Haas: Objected to as not responsive. There is nowhere in the evidence so far any showing that these strips are streets.

The Court: The objection is overruled. I will allow the question and answer to stand.

Mr. Haas: Exception, your Honor.

The Court: Note an exception.

Q. (By Mr. Healy): I believe I asked you this, but just so I fill in any technicality, these figures of a dollar each for these four parcels that you gave to us, those are your opinion as to the fair market value of those areas, is that right? I did not ask you as to the fair market value. Is that right?

A. They are, for this reason, that an appraiser going out to make an appraisal of a tract finds out the lots have been sold [86] either by metes and bounds or by lot and block number. It wouldn't make any difference in his mind what the metes and bounds description of lots are described as fronting on the street. He then investigates and finds in this particular case that the map was filed

(Testimony of Joseph J. Phillips.)

in the office of the Tide Land Commissioners, and that map was also filed in the office of the State Surveyor. He also finds that the streets have been accepted on all official maps of the City of San Francisco, and he cannot figure at a later date that a subdivider would come along and say, "Well, I sold you that lot purportedly on a street, but I didn't sell you the fee of the street," because if he were to sell that fee of the street, he is going to depreciate the value of the other property far more than the value of the street.

Q. Explain that last point in just a little more detail. Do you want to step down here?

A. No. That is all right. I can talk over here. It doesn't make any difference to the appraiser whether the lots are sold by metes and bounds or by lot and block number. The average appraiser believes if it is sold by lot and block there is no question but what the title comes to the center of the street, and if it is sold by metes and bounds it only goes to those metes and bounds. But a description of the metes and bounds describes that lot as fronting on some particular street, and with the filed maps carrying that out, we must suppose that those streets are designated as public streets and that they cannot be taken away from that [87] owner without suffering him a great deal of damage, and for that reason you cannot put any value on a street, no more than the nominal sum of a dollar.

(Testimony of Joseph J. Phillips.)

Mr. Haas: Again objected to, your Honor, for the same reason, non-responsive, and no proof shown that there are any streets here involved.

The Court: This witness is called as an expert as to value. I will allow the answer to stand.

Mr. Haas: Exception, your Honor.

The Court: Note an exception.

Q. (By Mr. Healy): Just one more question, one more subject, at any rate.

Are you familiar, Mr. Phillips, with the approximate number of large industrial sites that are now existent in the City and County of San Francisco and their approximate areas?

A. I am. Naturally in my position I have made a study of this over a great period of years and I have found that originally a great number of years ago, outside of the Hunters Drydock site there were only four large industrial areas, the Western Sugar Refining was about twenty-five——

Q. 25 acres?

A. 25 acres, the Pacific Gas and Electric Company, about twenty, the United States Government, Columbia Steel, about thirty, and the Bethlehem Steel about twelve. Those four and the Hunters Point Drydock itself were the only four large industrial sites purchased in San Francisco, [88] and a study of the ideal industrial site is approximately 3.67 acres. That is considered the ideal. Now, there are one or two exceptions, as there are always in these cases.

Q. (By Mr. Haas): How many acres?

(Testimony of Joseph J. Phillips.)

A. 3.67 acres is considered by all the experts with whom I discussed the matter, and from my own study—about 400 by 400, which equals 3.67 acres—is the ideal industrial site in San Francisco. There are one or two exceptions to that, and there are very few. Within the last few years the American Smelting and Refining Company assembled a large piece of property on Evans Avenue near Army that contained a little less than seven and a half. The Safeway also acquired from the Western Pacific a very large warehouse site, a storage site which was a little less than eight acres. With those two exceptions, practically all of the industrial sites in San Francisco would run from two, two and a half, up to four acres.

Mr. Healy: That is all. You may cross-examine.

Cross-Examination

By Mr. Haas:

Q. Mr. Phillips, you stated that you have appraised, made a point of appraising only for Government agencies, is that correct?

A. That is correct.

Q. Your appraisals have been, normally speaking, for the purpose of setting a value for acquisition purposes by the Government agencies?

A. Not always.

Q. Have you ever appraised for the purpose of sale by the [89] Government agency? A. Yes.

Q. In what cases, to your memory?

(Testimony of Joseph J. Phillips.)

A. Well, for instance, it is an every day occurrence with me. I am selling probably a million dollars of property this year, and I am appraising those pieces, and they cannot be sold unless it is at least ninety per cent of my appraisal. I am doing that almost every week. I have about ten or twelve of those—I have held, I guess, twenty sales already since the first of January.

Q. You are setting a sale price for property owned by the City?

A. Yes, that is correct.

Q. For how long have you been doing that?

A. Twenty or thirty years.

Q. You have testified that Parcel 3-A—perhaps I had better point them out—in Action 22147, Parcel 2 in Action 22416, Parcel 3-B in Action 22147, and Parcel 2 in Action 22261 are in your opinion each respectively of the value of one dollar, is that right?

A. Correct.

Q. And you have based that testimony, have you not, upon the theory that these parcels are streets, have you not?

A. Yes, sir, that they are streets——

Q. That is all. You have answered.

A. ——that they are streets furnishing access to the property sold by the Tide Land Commissioners.

Q. Would your opinion be the same if these parcels are not streets?

A. If I could see no complications in [90] the title it would be different, but where——

(Testimony of Joseph J. Phillips.)

Q. That is all, I think. Let us put it the other way.

Mr. Healy: Counsel, may I speak to his Honor for a moment?

Mr. Haas: Excuse me.

Mr. Healy: I would submit to your Honor that the gentleman on the stand should be permitted to finish his explanation.

The Court: Let him finish his answer.

Mr. Haas: Just a moment, your Honor, the rest of the answer was not responsive. That is why I cut it off.

The Court: You must wait until he concludes and move to strike.

Mr. Haas: I accept the rebuke and apologize.

Mr. Healy: You were about to explain something?

The Witness: I was about to explain in this particular case, with the knowledge that I have from the beginning of it, I cannot get away from the idea that no matter what quirk of the law there is, with respect to the title to the streets not having been passed, I certainly would not consider that a subdivider would have any right to sell off those blocks and fool the public by telling him he can't get to his lots. I can't get away from that in this case.

Q. You feel yourself unable to form an opinion as to their value if these were not streets?

A. I didn't say that. I said I cannot get away from the idea that these streets are [91] necessary.

(Testimony of Joseph J. Phillips.)

No matter how the title is held, the strips are necessary to furnish access, which was practically guaranteed by the subdivider when he sold that to the public.

Q. (By Mr. Haas): Suppose we examine that statement. Why do you feel that it is inevitable that these particular parcels, these particular portions of the parcel here colored in pink on this Defendants' Exhibit C, must be the strips that will be used for access?

A. I know that of my own knowledge. I know that these lots were sold by the Tide Land Commissioners with the description that they were on certain streets, and the descriptions so read. I cannot get away from that fact.

Q. I am in complete agreement with you, but what I am asking now is, if they are not actually streets, does your opinion of the value continue to be that they are worth a dollar?

A. Under the circumstances, as long as they are strips that are necessary for access to the property sold by the original subdivider, I would consider them only of a nominal value.

Q. That is with knowledge of the fact that it is perfectly possible that they might not be used for access, that they are not necessarily at a given time subject to such use?

Mr. Healy: Wait just a minute. I do not understand that question.

(Question read.)

(Testimony of Joseph J. Phillips.)

Mr. Haas: I think I will withdraw that question and put it this way: [92]

Q. Would it be true, Mr. Phillips, that your entire opinion of value is based on the theory that the lot owner may use these pink strips, strips colored in pink, in the various parcels on this Defendants' Exhibit C as streets, as a right to do it?

A. Well, I know as a matter of fact that he has a right to access. Whether you call them streets or not, he has the right to access over those strips.

Q. And your opinion is based solely upon that. If that were not true, that would not be your opinion, is that right?

A. My opinion is based on the fact that if through some quirk of the law the deed to those strips was in another party, then the original lot owners had been gypped by the subdivider, or else they would have a damage action against somebody for taking away their access.

Mr. Haas: I will ask the witness' answer be stricken as not responsive and that he be directed to answer the question.

The Court: Read the question.

(Question read.)

The Court: If you do not understand the question, say so.

The Witness: I thought I had answered it.

The Court: It is not a satisfactory answer to Counsel.

The Witness: Would you read the question again, please?

(Testimony of Joseph J. Phillips.)

The Court: I suggest that you reframe the question.

Mr. Haas: I should like to have it read.

(Question reread.) [93]

A. Well, I would say that the value of these pink strips would be nominal in any case, because they are not practical to be used. You could not use a strip that is either 64 or 80 feet in width, of the great length that these would be, unless you could combine them with the adjoining property, and the only value that they would have would be in combination with the adjoining property to furnish access to it.

Q. (By Mr. Haas): But with such a combination they would have definite value?

A. Yes, if the tract was laid out and you sold the streets first and then sold the white lot numbers afterwards, then they would have a value, if it had happened in that way.

Q. So that actually your value of one dollar is based, then, upon the fact that these are streets, isn't it?

A. Yes and no. I think I have covered both sides of it. I have placed in streets, and my last answer stated they would have no practical value if the streets had been sold first and then the rest of the property had been sold without any access in any way; the value would have been very low, and those owners, knowing that they had to buy this pink strip from this first purchaser, of course,

(Testimony of Joseph J. Phillips.)

they would have a value then, but that is the only way they would have it, and they would not have it otherwise.

Q. You stated that 3.67 acres was the ideal industrial site in San Francisco. Would you say that any one of these small blocks individually would be worthy of reclamation by itself? [94]

A. No, sir, it would not.

Q. Its value would be in connection with the reclamation only as part of the general plan?

A. No, that is not correct. Over the period of years, if you will search the titles, you will find there have been a great many transfers from time to time. It has had a certain market value. Whether the people in buying it figured it would pay them to hold it until such time as it was reclaimed, I don't know, but it has a market value as it stands today, not reclaimed, and it is sold on the general market and transferred many times without being reclaimed.

Q. But for the purpose—let us put it again—so far as any one of those individual blocks is concerned, would it have value alone for the purpose of reclamation as an industrial site?

A. Well, I have already stated that the only way to bring this property into the market would be to reclaim it as a whole.

Mr. Haas: That is all.

Mr. Healy: That is all, Mr. Phillips. Thank you.

GEORGE H. THOMAS, JR.

called on behalf of the plaintiff; sworn.

The Court: Your full name?

A. George H. Thomas, Jr.

The Court: Proceed. [95]

Direct Examination

By Mr. Healy:

Q. Mr. Thomas, what is your business or occupation?

A. Real estate broker and appraiser.

Q. Are you connected with any particular firm in San Francisco?

A. Yes, I am connected with Baldwin and Howell in the capacity of vice-president in charge of valuations.

Q. Baldwin and Howell have been in the real estate business in San Francisco since approximately when? A. 1885.

Q. And you have been connected with that firm about how long?

A. A little over twenty years.

Q. Have you had any experience, Mr. Thomas, in evaluating or appraising real property in and about the Bay region? A. I have.

Q. Just briefly tell his Honor some of your experiences?

A. I have been employed by the United States of America, the Navy Department, the Department of Justice, the War Department, the Maritime Commission, Federal Public Housing and other agen-

(Testimony of George H. Thomas, Jr.)

cies; employed by the State of California, the Division of Highways, the Toll Bridge Authority, Superintendent of Banks, Director of Finance, the Insurance Commissioner, Building and Loan Commissioner; I have been employed by the City and County of San Francisco; I have been employed by the Crocker First National Bank, the American Trust, the Bank of America, the Wells Fargo Bank, the Anglo-London-Paris National Bank, and several insurance companies. And I have appraised in excess of [96] \$250,000,000 worth of real estate in the last fifteen years.

Q. You are familiar, I take it, from the experiences you have had, with real property values in and about San Francisco and the Bay region, are you not? A. Yes.

Q. Did you have occasion at the request of the United States Government in the year 1942 to investigate and to make an appraisal of certain property that was later acquired by condemnation in these three actions now pending? A. I did.

Q. You have seen this exhibit which is on the board, these two exhibits introduced here by the defendant, the State of California?

A. Yes, sir.

Q. And you are familiar with those maps, are you not? A. Yes, sir.

Q. The areas depicted in pink are the subject matter of this litigation or this trial, I should say. I will give these parcels by numbers so we will have a clear record. In this Action 22416, with

(Testimony of George H. Thomas, Jr.)

respect to this area in pink that I am pointing to, which is known and designated as Parcel 2 in the State's answer, what in your opinion was the market value, the fair market value of that parcel in the year 1942?

A. The nominal value of one dollar, the value being reflected in the abutting properties.

Q. What in your opinion is the fair market value of this parcel immediately to the south, Parcel 3-A of Action 22147? A. One dollar. [97]

Q. Turn your attention here, please, to this Parcel 3-B of Action 22147. What in your opinion was the fair market of that parcel in the year 1942 at the time of its taking?

A. The nominal value of one dollar, due to the value being reflected in the abutting property.

Q. And this parcel, designated Parcel 2 in the State's answer in Action No. 22261, what in your opinion was the fair market value of that parcel?

A. The nominal value of one dollar, due to the fact that the value is reflected in the abutting property.

Q. Now, you have given your conclusions to his Honor. Will you kindly state some of the reasons that go into the conclusions you have just expressed?

A. I appraise the property as a subdivided property. I have made a complete analysis of the many sales that have been made of the properties abutting the properties in question, the subject property, and have consequently reflected the value of the

(Testimony of George H. Thomas, Jr.)

property, the value of the roadways, streets, strips, or whatever you choose to call them is reflected in the abutting property, and the organization that I am associated with, we have put on many subdivisions and bought property in acreage and sold it and subdivided it, and, consequently, the subdividing, with access for ingress and egress, the value has been reflected in the properties we have sold the same as the subject property here. If that property was appraised before it was subdivided, appraised regardless [98] of the map that had been filed, as just acreage, it would have an entirely different value, but the property was appraised as being owned by several property owners.

Q. You mean the blocks now?

A. The blocks. Consequently they paid for the streets that were supposed to exist as shown on that map, and the benefit of those streets was reflected in the properties that were acquired. If that was not laid out as a street, it was not a subdivision, if it was appraised as an entire, just acreage, it would have an entirely different value. We figured that the value would be about one-fifth of what it was as a subdivided property, so that if the title was vested in one ownership as a whole, it would be appraised for a whole lot less than it was appraised as a subdivided property by me.

Q. With respect to this fraction of one-fifth, you mean if it were just a bulk, not subdivided or cut up or not divided in any fashion but in one

(Testimony of George H. Thomas, Jr.)

ownership, it would be worth approximately one-fifth of what it would be when laid out in different ownerships in lots and blocks?

A. That is right.

Q. Generally considered as more or less a standard quotient or factor?

A. Yes. If a property is worth \$800 an acre subdivided, it might have a market value not subdivided of \$100 or \$150 an acre.

Q. Mr. Thomas, just generally speaking now—will you take any block—I do not mean here, but any place in the country that [99] does not have any access to it—will you state whether it has any value?

A. No, it would have a nominal value if it did not have any access, if it was eliminated from access, if you put a barrier in front of Seventh Street and couldn't get into this property.

Q. It is of practically no value. I am speaking now of any place. When a road or a street is laid out affording access to our given block, then it takes a value; it takes on value, does it not?

A. The property takes the value. The value of the street is reflected in the value of the property.

Q. And the area that is now being used for access, whatever value that has, is reflected over into the value of the——

A. Abutting property.

Q. And that is afforded the property given the access, is that correct?

A. That is correct.

(Testimony of George H. Thomas, Jr.)

Q. That is true of practically any place one can go, isn't that so?

A. It has been my experience, and I have appraised all the property acquired at Hunters Point, not only the submerged, but the upland that was used, which were many thousands of parcels, and all the streets were allowed a nominal value of one dollar, and that runs from Evans south to the County line and from Third Street including the waterfront.

Q. I omitted to ask you, but you somewhat implied it. Did you appraise the value of these blocks in here, too, as well as the pink areas? You appraised the whole thing? [100]

A. I appraised the entire project.

Mr. Healy: You may cross-examine.

The Court: We will take a brief recess.

(Recess.)

The Court: Proceed.

Mr. Healy: We have no further questions. You may cross-examine.

Cross-Examination

By Mr. Haas:

Q. Mr. Thomas, you have testified as to the values of the various parcels, assigning the following parcels, as shown on Defendants' Exhibit C and marked in pink thereon the value of one dollar each: Parcel 2 in Case 22416, Parcel 3-A in Case 22147, Parcel 3-B in Case 22147 and Parcel 2 in

(Testimony of George H. Thomas, Jr.)

Case 22261, stating that this was a nominal value, that the value was reflected in the abutting property in your appraisal, is that correct?

A. Yes, sir.

Q. If that value were not reflected in the abutting property, would you still be of the opinion that the strips so marked in pink had a purely nominal value?

A. Yes, sir.

Q. Even if the value of the strip was not reflected in the abutting property?

A. As the property is laid out on the map, with the different ownerships abutting on the strips.

Q. Assuming that the strips have attached to them solely the value in themselves, that none of this value is to be reflected in the abutting property, looking at this purely as a series of [101] ownerships, this block owned by one party, this grid owned by another—the grid in pink—for purposes of sale, the reasonable market value, wouldn't the grid as such actually have a higher value than the blocks enclosed?

A. No, not in my opinion.

Q. Although these enclosed ones would have, as you put it, no access?

A. I appraised it as I understood it to be, as subdivided property with all the different ownerships. Now, as that condition existed in my mind, upon investigation, those were streets, strips, roadways, or whatever you might choose to call them.

Q. In other words, your appraisal is based on the theory that those were actually streets?

A. Absolutely, yes.

(Testimony of George H. Thomas, Jr.)

Q. And if they were not streets, that appraisal would not be affected, then?

A. If they were not, if it was all acreage, and it was in one ownership, my value would be one-fifth of what it was as it is laid out on the map.

Q. And if these are actually strips, but under different ownership—I will repeat it—under different ownership—each of the blocks being under one ownership and all of these strips being under one ownership, would you say that those strips would only have a nominal value?

A. If you are taking it as a parcel, that whole——

Q. That is right? A. As acreage.

Q. Yes?

A. Then I would appraise it as acreage. [102]

Mr. Haas: That is all.

Redirect Examination

By Mr. Healy:

Q. I do not know that I quite understood the last question that Counsel asked you, the next to the last, and the answer that was given. Let me ask you, to clarify this a bit, Mr. Thomas, when you speak of one ownership, if this whole area, that is, the pink strips plus the lots in between were in one ownership—— A. Yes.

Q. And you were to appraise it, in your opinion you would arrive at a certain amount, and you think that that amount would be approximately one-fifth of what you previously appraised the whole acreage? A. Yes.

(Testimony of George H. Thomas, Jr.)

Q. Is that it?

A. With the distinct understanding that it was all in one ownership, the entire acreage.

Q. In other words, not subdivided, one ownership, a bulk piece of land? A. That is right.

Q. Would be approximately one-fifth of what you conceived it to be when it was cut up in lots and blocks with streets down through the lots and blocks?

A. As it is laid out and subdivided on the map; it has an entirely different value as a subdivision than it would be as an acreage.

Q. Mr. Haas asked you, I believe, what your opinion would be as to the value of these pink strips, whether they were streets or not, and I believe you told him that because of their peculiar shape, the long narrow shape, that they would still have only [103] a nominal value?

A. As far as fair market value, they would have a nominal market value of one dollar due to the utility, shape of the property?

Q. Due to the shape of the property?

A. There would be no use.

Mr. Healy: I think it is clear now, at least to me.

Recross-Examination

By Mr. Haas:

Q. When you say that due to the utility, the shape, there would be no use to these strips, may I ask whether in an ordinary block—take a block on upland—suppose you had a strip a foot wide

(Testimony of George H. Thomas, Jr.)

through the center of the block: Would you say that that has no utility in it?

A. That is right.

Q. Would it have any value?

A. Nominal value.

Q. In other words, if there is a building—

A. A nominal or a nuisance value.

Q. But that nuisance or nominal value might be very high, might it not?

A. Very limited, very nominal.

Q. Regardless of the position of that strip?

A. As far as fair market value is concerned. To go out and sell it in the open market to a willing buyer, not compelled to buy and a willing seller not compelled to sell, with a meeting of the minds and transfer of money, it would have a very limited market value.

Q. In other words, in your opinion the fact of these mixed [104] ownerships deprives the strips of value—that is, eliminating the possibility that they might be strips, might be streets—deprives the strips of value without depriving the blocks of value?

A. The streets or the strips or what they might be, the value is reflected in the abutting property because it makes it possible for ingress and egress and accessibility.

Q. If the value is not so reflected, then the value is more than nominal, is that right?

A. The value, the fair market value, is definitely nominal.

(Testimony of George H. Thomas, Jr.)

Q. Regardless whether the value is reflected in the adjoining strips or not?

A. I placed the value of the streets as reflecting into the abutting property because it gave the property access; but to go out and sell the streets, I do not know who you could sell them to. Who would be the buyer?

Q. In other words, your whole theory is based upon these being streets?

A. It is not theory.

Q. That is the basis of your appraisal?

A. It is practical judgment from years of experience.

Q. That is the basis of your appraisal though, is that right?

A. It is not theory; it is just—rarer than genius—common sense.

Q. And actually that is the basis of your appraisal, that these are streets and subject to the usual——

A. Streets, easements, roadways. [105]

Q. Let us take Block 709, which I will call your attention to here. You see a strip next to it, in front of that a blue strip, which faces on the non-proprietary property on the water as laid out. Would you say that that strip next to the other strip in state ownership has no value?

A. Yes, sir, a nominal value of one dollar.

Q. Regardless of the fact that it is right next to a strip available for the building of wharves?

A. That is right.

(Testimony of George H. Thomas, Jr.)

Q. And that is on the basis that the value of the strip is reflected in the wharves, is that right?

A. Makes it accessible to that, yes.

Q. In other words, the value is reflected in the wharves, is that right? A. Yes.

Q. Even though that value is only one dollar?

A. Yes.

Mr. Haas: Thank you. That is all.

Further Redirect Examination

By Mr. Healy:

Q. Mr. Thomas, when you speak of nominal value, do you mean a value of one dollar?

A. Yes, sir.

Q. One other point. You have given us your opinion as to the value of these areas indicated in pink on this exhibit if they were streets. Then you have also given us your opinion as to their value even they were not in contemplation of law streets. Do I understand your opinion to be that they are still only worth a dollar because of the non-utility of them due to their peculiar shape, their elongated shape? A. That is right. [106]

Mr. Healy: That is all, Mr. Thomas. With that evidence, your Honor, the United States rests its case.

(Plaintiff rests.)

Mr. Haas: May I suggest, your Honor, that this go over to the afternoon for argument?

The Court: Is this all the testimony that you are going to submit?

Mr. Haas: That is the testimony in the matter.

The Court: Do I understand, then, that the case it submitted on both sides as to the testimony?

Mr. Haas: As to the testimony?

Mr. Healy: Yes.

(Discussion as to the submission of the case, at the conclusion of which it was agreed that briefs would be submitted, the first by the State of California in twenty days, and the reply brief of the United States Government in fifteen days, and the reply brief of the State of California in five days.)

Certificate of Reporter

I, J. J. Sweeney, Official Reporter, certify that the foregoing 27 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ JOSEPH J. SWEENEY. [107]

[Endorsed]: No. 11797. United States Circuit Court of Appeals for the Ninth Circuit. State of California, Appellant, vs. United States of America, Appellee. State of California, Appellant, vs. United States of America, Appellee. State of California, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 22, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth District

No. 11797

STATE OF CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER PERMITTING THE CONSIDERA-
TION OF THE ORIGINAL PAPERS AND
EXHIBITS CERTIFIED TO THE CIR-
CUIT COURT WITH LIKE EFFECT AS
IF PRINTED IN THE RECORD ON AP-
PEAL

It appearing to the court that the exhibits in the
above entitled matter consist of maps, diagrams and

original papers not capable of reproduction in the printed record, and it further appearing to the court that the said exhibits have been certified pursuant to order of the District Court as a portion of the record on appeal.

Now, Therefore, It Is Hereby Ordered that said copies of the original papers and exhibits, which have been certified to the Circuit Court of Appeals by the District Court, may be considered by this court with like effect as if said papers and exhibits had been printed in the record on appeal without the necessity of printing said papers and exhibits in the record on appeal.

Dated December 2, 1947.

FRANCIS A. GARRECHT,
Judge of the Circuit Court.

[Endorsed]: Filed Dec. 3, 1947. Paul P. O'Brien,
Clerk.

No. 11,797

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

STATE OF CALIFORNIA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Respondent.

Upon Appeal from the District Court of the United States
for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

FRED N. HOWSER,

Attorney General of the State of California,

HAROLD B. HAAS,

Deputy Attorney General of the State of California,

MIRIAM E. WOLFF,

Deputy Attorney General of the State of California,

600 State Building, San Francisco 2, California,

Attorneys for Appellant.

FILED

APR 1 - 1948

Table of Contents

| | Page |
|---|------|
| Subject of appeal | 1 |
| Specifications of error | 2 |
| Argument | 3 |
| Statement of facts | 3 |
| I. The state is entitled to adequate compensation for its fee simple title to the parcels here involved..... | 5 |
| A. The holding in this case is in direct conflict with United States v. Benedict, 280 Fed. 76 (affirmed U. S. v. Benedict, 261 U. S. 294) | 5 |
| B. There is no evidence that the areas here involved ever were streets | 15 |
| Conclusion | 20 |

Table of Authorities Cited

| | Pages |
|--|----------------|
| Archer v. Salinas City, 93 Cal. 43 | 19 |
| City of Anaheim v. Langenberger, 134 Cal. 608..... | 19 |
| City of Los Angeles v. Kysor, 125 Cal. 436 | 19 |
| City of Sacramento v. Clunie, 120 Cal. 29 | 19 |
| County of Inyo v. Given, 183 Cal. 415 | 18 |
| Eldridge v. Cowell, 4 Cal. 80 | 16 |
| Kerr v. South Park Commissioners, 117 U. S. 379..... | 20 |
| McGinn v. Harbor Commissioners, 113 Cal. App. 695..... | 16 |
| Shoemaker v. United States, 147 U. S. 282 | 20 |
| United States v. Benedict, 280 Fed. 76 (affirmed 261 U. S. 294) | 5, 6, 7, 8, 20 |

No. 11,797

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STATE OF CALIFORNIA,

VS.

UNITED STATES OF AMERICA,

Appellant,

Respondent.

Upon Appeal from the District Court of the United States
for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

SUBJECT OF APPEAL.

This is an appeal from the judgment of the District Court awarding the State of California the sum of One and no/100 (\$1.00) Dollar in each action for its interest in each of the following parcels: Parcels 3A and 3B in case No. 22147; Parcel 2 in case No. 22261 and Parcel 2 in case No. 22416. These actions were consolidated for trial and have been consolidated for purposes of appeal. The same general state of facts are present in all of the parcels. The parcels, which are the subject of this appeal, are marked in pink on the map of Defendant's Exhibit "C", which exhibit

has been transmitted in the original form as part of the record on appeal. The trial Court found that the State of California was the owner of these areas, so marked in pink, and no appeal is taken from that judgment. The sole question before this Court, and the only point raised on this appeal, is the question of the proper value of the areas.

SPECIFICATIONS OF ERROR.

Appellant cites the following as its specifications of error:

1. That the trial Court erred in finding that the interest or title that the State of California retained in Parcels 3-A and 3-B of action No. 22147, Parcel 2 of action No. 22261 and Parcel 2 of action No. 22416 was retained solely for the purpose of providing ingress and egress to said lots sold.

2. That the Court erred in finding that the interest or title that the State of California retained in the above-mentioned parcels was, at the date of the taking herein, subject to easements for access to and from the lots delineated upon the survey map.

3. That the Court erred in finding that the proper compensation for the taking of the aforesaid parcels, including any and all damages to the larger tracts to which the said parcels were a part, was the sum of \$1.00.

4. That the Court erred in failing to find that said property was never laid upon the grounds as streets.

5. That the Court erred in not finding and in not concluding that the said property was never opened nor declared open as streets.

6. That the Court erred in not finding and in not concluding that the said property was never dedicated as streets.

7. That the Court erred in not finding and in not concluding that the said property was not subjected to any easement as streets.

8. That the said Court erred in rendering its decision and making and entering its judgment herein in that the evidence was and is insufficient to justify the judgment rendered by said Court.

9. That the Court erred in rendering its decision and making and entering its judgment herein against the defendant, State of California, in that said judgment is contrary to the law and the facts.

10. That the Court erred in not making its judgment herein in favor of the defendant, State of California, and against plaintiff United States of America in the sum of \$31,232.25 in action No. 22147, in the sum of \$56,384.10 in action No. 22261 and in the sum of \$8,250.03 in action No. 22416.

ARGUMENT.

STATEMENT OF FACTS.

The State of California and the United States of America entered into a stipulation. (Clk. T. 34-39; 165-169.) Briefly summarized, the stipulation pro-

vides that prior to September 9, 1850, all of the lands which form the basis of the subject matter of this appeal were tide and submerged lands covered by the waters of the Bay of San Francisco. California, upon its admission to the Union on that date, acquired the title to these tide and submerged lands as sovereign lands. By the Act of 1868, page 716, a Board of Tide Land Commissioners was created and authorized and directed to take possession of the salt marsh and tide lands and lands lying under water in the City and County of San Francisco to have the same surveyed to a point within twenty-four feet of water at the lowest stage of the tide, and the Board was then directed to establish the water line front of San Francisco and to cause all of the property belonging to the State lying south of Second Street to be surveyed into lots and blocks.

Pursuant to said Act, and by its authorization and direction, the Board prepared maps of the area as resurveyed and sold the lots, so established, at public auction. All of the conveyances of lots were by metes and bounds, the State retaining title to the areas marked in pink as above stated.

Of these areas, Parcel 3A of action No. 22147 consists of 6.85 acres, Parcel 3B of action No. 22147 consists of 28.13 acres, Parcel 2 of action No. 22261 consists of 64.61 acres, and Parcel 2 of action No. 22416 consists of 8.73 acres.

It will be noted from an examination of defendant's Exhibit "C" that the area marked in pink consists of a series of strips of land lying between the

parcels conveyed. It was the contention of the United States, and the finding of the trial Court that the strips were streets and were retained by the State of California solely for ingress and egress. The State of California disagrees with this contention and finding and it is the claim of the State of California that the land retained by the State was acreage and was entitled to be valued upon the same basis as the remainder of the acreage in the condemnation action.

The trial Court expressly found, and appellant wishes to again emphasize the fact, that at the time of the taking in this condemnation all of the acreage lay under the waters of the Bay of San Francisco. This was true of the adjacent property condemned and was also true of these areas marked in pink on defendant's Exhibit "C", which parcels are the subject of this appeal. (Clk. T. 43, 103, 149.)

I.

THE STATE IS ENTITLED TO ADEQUATE COMPENSATION FOR ITS FEE SIMPLE TITLE TO THE PARCELS HERE INVOLVED.

A. The holding in this case is in direct conflict with *United States v. Benedict*, 280 Fed. 76. (Affirmed *U. S. v. Benedict*, 261 U. S. 294.)

It is the contention of the State of California that it is entitled to adequate compensation for its fee simple title to the parcels which are the subject of this appeal. The finding of the trial Court is in direct conflict with the authority established by *United States v. Benedict*, 280 Fed. 76. (Affirmed *U. S. v.*

Benedict, 261 U. S. 294.) In that case one Langley had conveyed a considerable body of land, consisting both of upland and land under water, into trust with a power of sale. In compliance with this power the trustee of the Langley estate conveyed certain portions of the property to the City of New York to be used as streets. Parenthetically, it should be noted here that the case at bar is a stronger case than the *Benedict* case, since in the latter case the city could not have used the property for any other purpose, whereas, in the case at bar the State did actually retain the fee title interest to the property. However, as in the case at bar, the so-called streets in the *Benedict* case were never opened or used as highways. Thereafter the United States acquired title to the Langley realty. An award was made to the Langley estate at a rate of \$2.00 per square foot. The Court holds that the city is entitled to a pro-rata of the award based on the number of square feet held by the city at the rate of \$2.00 per square foot, and in this connection the Court states:

“It is now argued that, with a title of this kind and on evidence proving that ‘whether or not the city held title to’ the 81,120 square feet, the value of the entire property was just the same, and the award to the Langley Estate should not be disturbed in amount. But, if the record be examined to ascertain why the expert witnesses substantially agreed that the value of the land was unchanged by the conveyance for street purposes, it is found that they all said in effect that street value (i. e., land value of the streets) was

‘reflected’ in the value of the land as bounded or limited by the proposed streets.

“This means that, if and when the streets were opened, the abutting property would, by reason of the streets, be worth at least as much more as was the value of the land appropriated for highway purposes. But no streets have been opened in the physical sense, and the city owns the surface to be devoted to streets. That it is held in trust for a public purpose does not in any way change its market value, and the city has been as much deprived of what it owned as was the Langley Estate. To put it another way, the Langley Estate has been awarded all that the land is worth, streets and all, *because, when streets are opened, the land they have left will be worth the amount of the award. This will not do. The Government is called upon to make just compensation for things as they are, not as they may be hereafter, and the compensation must flow to those who were actually deprived of what they own.*” (Italics ours.)

In the instant case, the United States called two expert witnesses, both of whom made exactly the same error in the valuation as that made in the *Benedict* case.

Mr. Phillips, the first witness for the United States, testified that the value of the property of the State was \$1.00. It is perfectly evident from a reading of the record that he based this valuation on the assumption that the property was streets and furthermore he specifically testified that the value of the street area was reflected in the adjoining property. This

is the identical procedure which was adjudged an error in the *Benedict* case. On direct examination Mr. Phillips testified:

“A. Originally land is purchased in large acreages, and when there is demand on the part of the public for the purchase of that land, it is naturally subdivided. The subdivider lays out those tracts into what he believes is the best size lot and block for the particular need at that time. He files a map showing streets, so that access can be obtained to all of these blocks which he disposes of, and as a result of that, the value that was in the area taken by the streets is absorbed by the land that is sold plus an additional value to that land. If there was not an additional value there would be no object in the man subdividing it, because he could just as well sell it off in acreage, so the appraiser must take the position, and it is borne out by the facts, *that the value of the street is absorbed into the value of the property sold plus an additional value.*” (R. T. p. 85, line 22, p. 86, line 11; italics ours.)

Mr. Phillips then went on to explain that in reality his testimony was based on the fact that the areas of the State's claim were streets and he stated:

“* * * It doesn't make any difference to the appraiser whether the lots are sold by metes and bounds or by lot and block number. The average appraiser believes if it is sold by lot and block there is no question but what the title comes to the center of the street, and if it is sold by metes and bounds it only goes to those metes and bounds. But a description of the metes and bounds describes that lot as fronting on

some particular street, and with the filed maps carrying that out, we must suppose that those streets are designated as public streets and that they cannot be taken away from that owner without suffering him a great deal of damage, and for that reason you cannot put any value on a street, no more than the nominal sum of a dollar.” (R. T. p. 87, line 16 to p. 88, line 3.)

On cross-examination Mr. Phillips testified as follows:

“Q. (Mr. Haas). And you have based the testimony, have you not, upon the theory that these parcels are streets, have you not?

A. (Mr. Phillips). Yes, sir, that they are streets—

Q. That is all. You have answered.

A. —that they are streets furnishing access to the property sold by the Tide Land Commissioners.” (R. T. p. 90, lines 18-23.)

Mr. Thomas, the other expert witness for the United States, made exactly the same error as that made by Mr. Phillips. After testifying that the property of the State was worth \$1.00, on direct examination Mr. Thomas testified:

“Q. (Mr. Healy). Now, you have given your conclusions to his Honor. Will you kindly state some of the reasons that go into the conclusions you have just expressed?

A. (Mr. Thomas). I appraise the property as a subdivided property. I have made a complete analysis of the many sales that have been made of the properties abutting the properties in question, the subject property, and have consequently re-

flected the value of the property, the value of the roadways, streets, strips, or whatever you choose to call them is reflected in the abutting property, and the organization that I am associated with, we have put on many subdivisions and bought property in acreage and sold it and subdivided it, and, consequently, the subdividing, with access for ingress and egress, the value has been reflected in the properties we have sold the same as the subject property here. *If that property was appraised before it was subdivided, appraised regardless of the map that had been filed, as just acreage, it would have an entirely different value,* but the property was appraised as being owned by several property owners.

Q. You mean the blocks now?

A. The blocks. Consequently they paid for the streets that were supposed to exist as shown on that map, *and the benefit of those streets was reflected in the properties that were acquired.* If that was not laid out as a street, it was not a subdivision, if it was appraised as an entire, just acreage, it would have an entirely different value. We figured that the value would be about one-fifth of what it was as a subdivided property, so that if the title was vested in one ownership as a whole, it would be appraised for a whole lot less than it was appraised as a subdivided property by me.” (R. T. p. 98, line 11 to p. 99, line 14; italics ours.)

On cross-examination Mr. Thomas testified:

“A. (Mr. Thomas). I appraised it as I understood it to be, as subdivided property with all the different ownerships. Now, as that condition

existed in my mind, upon investigation, those were streets, strips, roadways, or whatever you might choose to call them.

Q. (Mr. Haas). In other words, your appraisal is based on the theory that those were actually streets?

A. Absolutely, yes.

Q. And if they were not streets, that appraisal would not be affected, then?

A. If they were not, if it was all acreage, and it was in one ownership, my value would be one-fifth of what it was as it is laid out on the map."

(R. T. p. 102, lines 7-17.)

In addition, both Mr. Phillips and Mr. Thomas testified that the value of the State's claim would be nominal on the basis that since the property was either sixty-four feet wide or eighty feet wide, and was of far greater length, the property could not have practical use. (R. T. pp. 94, 103, lines 22-25, p. 104, lines 1-5.) However, it is obvious that such a contention is not a conclusion of fact nor a proper expression of expert opinion, but is in reality a conclusion of law. The files of these cases demonstrate that numerous awards have been made by the government for property of the following sizes and for the amounts as indicated:

Action No. 22261. Parcel No. 29. 25 feet x 100 feet and Parcel No. 31. 95 feet x 100 feet x 54 feet x 105 feet, 11½ inches. (A portion of Lots 5 and 6 of Tide Land Commissioners' Block 319.) Amount of award \$195.00; Final Judgment filed February 23, 1944.

Parcel No. 30. 25 feet x 100 feet. Amount of award \$50.00; Final Judgment filed April 26, 1945. (Parcel 30 is adjacent to Parcel 29 above.)

Parcel No. 28. 100 feet x 45 x 105 feet, 11½ inches x 74 feet, 8½ inches. (Being a portion of Lots 2 and 3 of Tide Land Commissioners' Block 319) and Parcel No. 32, being a triangle 54 feet x 165 feet, ¾ inches x 156 feet, 3 inches. (Being part of Lots 7, 8, 9 and 10 of Tide Land Commissioners' Block 319.) Amount of award \$197.00; Final Judgment filed September 25, 1944.

Parcel No. 58. 100 feet x 300 feet. (Being all of Lots 3 through 8 of Tide Land Commissioners' Block 395) and Parcel No. 71. 100 feet x 150 feet. (Being Lots 12, 13 and 14 of Tide Land Commissioners' Block 763) and Parcel No. 73. 100 feet x 150 feet. (Being Lots 18, 19 and 20 of Tide Land Commissioners' Block 763.) Amount of award \$235.00; Preliminary Judgment filed October 6, 1943.

Parcel No. 44. 50 feet x. 100 feet. (Being Lot 4 of Tide Land Commissioners' Block 725.) Amount of award \$68.00; Final Judgment was filed February 21, 1944.

Parcel No. 10. 100 feet x 200 feet. (Being Lots 1, 2, 23 and 24 of Tide Land Commissioners' Block 714.) Amount of award \$300.00; Preliminary Judgment filed October 6, 1943.

Parcel No. 13. 100 feet x 200 feet. (Being Lots 15, 16, 17 and 18 of Tide Land Commissioners' Block 714) and Parcel No. 11. 100 feet x 300 feet. (Being

Lots 3 through 8 of Tide Land Commissioners' Block 714.) Amount of award \$900.00; Final Judgment filed February 29, 1944.

Action No. 22147. Parcel No. 263. 50 feet x 200 feet x 7 feet, $7\frac{1}{4}$ inches x 62 feet, 7 inches x 104 feet, $2\frac{1}{2}$ inches. (Being Lots 12 and fractional Lot 17 of Tide Land Commissioners' Block 1036.) Amount of award \$130.00; Final Judgment filed August 14, 1944.

Parcel No. 265. 50 feet x 100 feet. (Being Lot 22 of Tide Land Commissioners' Block 1036.) Amount of award \$75.00; Final Judgment filed August 14, 1944.

Parcel No. 256. 200 feet x 196 feet, 8 inches x 273 feet, 3 inches x 382 feet, $10\frac{1}{2}$ inches. (Being all of Tide Land Commissioners' fractional Block 1031.) Amount of award \$1,000.00; Final Judgment filed August 3, 1944.

Parcel No. 249a. In two parts being 100 feet x 150 feet and 100 feet x 50 feet. (Being Lots 1, 2, 3 and 18 of Tide Land Commissioners' Block 1024.) Amount of award \$440.00; Final Judgment filed August 3, 1944.

Parcel No. 246. A triangle 267 feet, 7 inches x 283 feet, $5\frac{1}{2}$ inches x 97 feet, $7\frac{1}{2}$ inches. (Being all of Tide Land Commissioners' fractional Block 68.) Amount of award \$640.00; Final Judgment filed August 3, 1944.

Parcel No. 266. In two parts 50 feet x 100 feet and 350 feet x 100 feet. (Being Lots 1 and 17 through 23 inclusive of Tide Land Commissioners' Block 1036.)

Amount of award \$591.00; Final Judgment filed June 28, 1944.

Parcel No. 255. A triangle 131 feet, 2 inches x 179 feet, 3 inches x 122 feet, 2 inches. (Being all of Tide Land Commissioners' fractional Block 1028.) Amount of award \$125.00; Final Judgment filed October 10, 1944.

Since the State's property differs in no way from the property of the other owners in the area of condemnation, and since under the *Benedict* case it is improper to reflect the value of the State's interest in the value of the adjoining property it must, of necessity, follow that the State's interest is worth more than a nominal value. The only evidence of actual value is found in the testimony of Mr. Field wherein he testified that the property was worth $11\frac{1}{2}\%$ per square foot and the amounts are totaled as follows: Action No. 22416, Parcel 2, \$6,548.00; (R. T. 47) Action No. 22147, Parcel 3A, \$5,111.00; (R. T. 47) Action No. 22147, Parcel 3B, \$20,325.00; Action No. 22261, Parcel 2, \$48,458.00 (R. T. p. 48).

Mr. Field, the expert witness called by the State, based his appraisal on the property as a whole and did not reflect the value of the adjoining property in the property claimed by the State nor did he reflect the value of the State's property in the valuation given to the remaining property. (R. T. p. 51, lines 13-15.)

So far as actual value is concerned it is perfectly evident that none of the property had utility as such by reason of the fact that all of the property lay

under the waters of the bay, but while such property did not have utility it admittedly had value, and any conclusion that it did not is obviously a conclusion of law and not a statement of fact.

We respectfully urge that this Court reverse the finding of the trial Court that the State was only entitled to nominal value for the taking and that this Court either make a finding of the actual value or direct the trial Court to make such finding.

B. There is no evidence that the areas here involved ever were streets.

It was the contention of the United States that the areas involved on this appeal were streets, and that consequently the State was entitled only to nominal compensation for its ownership. Actually there is no evidence in the record that these areas were ever dedicated or accepted as streets. Even if we assume, for the sake of this argument, that the dedication of the areas as "streets" on the map of the Tide Land Commissioners was an offer of dedication, there is still no evidence that such offer was ever accepted by any authority nor ever, as a matter of fact, that such dedication was ever made. If the property owners had improved their property it would, of course, have been necessary for them to raise the property above the waters of San Francisco Bay. In the event that this had been done the State would undoubtedly have dedicated the streets but in return the State would have received an extremely valuable waterfront property which would have more than compensated it for

the acreage it had lost. At the time of condemnation the so-called streets were approximately twenty-four feet under water of the Bay and had never been used as a means of ingress or egress. In short, they had never become streets.

The unanimous testimony of the appraisers is that all values are on a basis of potential reclamation, that this reclamation is practicable only of a large area in a single operation.

This being the case it becomes clear that the question whether or not the strips involved would be used or opened as streets is a matter of pure guesswork. It would depend entirely upon the nature and purpose of the reclamation. The history of the city, from the cases, shows that tideland sales of this nature were made in expectation of continuous development, bit by bit, by individual lot owners. (*Eldridge v. Cowell*, 4 Cal. 80, 87.) This happened in the early days, and did not happen in recent years. The filling of the area around Channel Street resulted from accident, the San Francisco Fire of 1906. (*McGinn v. Harbor Commissioners*, 113 Cal. App. 695, 698.) The next move was the 1912 India Basin condemnation. (See Defendant's Exhibit G.) Gradual piecemeal reclamation, preserving the street lines, has not occurred during this century, except by happenstance of the 1906 Fire. Any reclamation of this area, after it had been untouched for fifty years, would be feasible only under a scheme whereby the entire area would be acquired by the reclaiming party. In such an oper-

ation, the theory that the street and lot lines would be followed is without support; on the contrary, the reclaiming party would have to acquire the entire area, including the strips reserved by the State or it would become impracticable to profitably reclaim. This being the case, there was and is no support for valuation on a subdivision basis since there was no more likelihood that the area would be reclaimed as a subdivision than that it would be reclaimed for a railroad yard, shipyard, or large factory area. It cannot be presumed that such an operation would be carried through without first acquiring title to *all* the land involved, including the strips originally reserved for streets, indeed the appraisers in this case in effect so testified.

There was no conflict on this point. Mr. Phillips, the appraiser for the United States, testified that the only way to bring this property into the market would be to reclaim it as a whole. (R. T. 95, lines 15-16.) The testimony of Mr. Field, appraiser for defendant, was to the same effect. (R. T. 56, lines 18-20.)

This being the case, values founded on a subdivision basis, as prescribed by the judgment here appealed from, are speculative. The acreage basis above affords true indicia of value, since only on that basis is reclamation practicable.

It is settled law in the State of California that an offer to dedicate an area as streets must be accepted before the area becomes a street.

County of Inyo v. Given, 183 Cal. 415, 418, 419, 420.

In that case the Supreme Court of California states:

“A dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burdens nor confer any rights, unless there is an acceptance. The rule therefore is, that acceptance on the part of the public is necessary to a valid dedication of land as a highway. (1 Elliott on Roads and Streets, sec. 122; 8 R. C. L., p. 898.) Respondent claims, however, that defendants are estopped to deny that the streets delineated on the map were accepted, by reason of the filing of the map and the sale of lots with reference thereto, and it was upon this theory, no doubt, that the trial Court based its decision.

“That some confusion exists in the authorities in this state where the subject has received consideration there can be no doubt. Some of the cases confuse the doctrine of dedication with other doctrines pertinent only to private inter-relations growing out of sales. The case of *Town of San Leandro v. LeBreton*, 72 Cal. 170 [13 Pac. 405], is of such character. It is there held that where an owner of land lays off a town and makes a map thereof showing it to be divided into streets, alleys and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets, to the use of the public, and that in such a case no formal acceptance is necessary by the town authorities. The rule announced in this case is mere *dictum*, as it appeared that there

was an acceptance. The rule declared in that case is one of constructive dedication, and undoubtedly could be invoked in an action between the dedicator and his grantees. But the purchasers here, if there be any, are not complaining. . . .”

See also:

City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855;

City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90;

City of Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 42;

Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839.

In order that there be a dedication and acceptance in this case, it is our contention that it would first have been necessary to raise this land above the waters of the Bay of San Francisco. Had this been done the State would have been more than greatly compensated for a dedication of these parcels as streets, since such reclamation would have resulted in the State possessing valuable *reclaimed* water front property without expense to it. (Defendant’s Exhibit “C”: Parcels 1 and 2 in case No. 22147; Parcel 1 in case No. 22416, and Parcel 1 in case No. 22261) and valuable usable and taxable property. However, at the date of condemnation, these strips, which the trial Court has found to be streets, still lay under the waters of the Bay and had never been used by anyone for ingress or egress to the adjoining property.

It is virtually axiomatic that the condemner must compensate for property in the condition that he finds it.

Kerr v. South Park Commissioners, 117 U. S. 379, 386;

Shoemaker v. United States, 147 U. S. 282, 304;

United States v. Benedict, 280 Fed. 76.

At the time of the taking the land involved in this appeal was not, and never had been, a street and lay under the waters of the Bay exactly in the same condition as the property adjoining it.

CONCLUSION.

It is respectfully urged that the judgment of the trial Court awarding nominal damages to the appellant, State of California, on Parcels 3A and 3B in case No. 22147, and Parcel 2 in case No. 22261, and Parcel 2 in case No. 22416 be reversed and that this Court either find the value of this property or direct the trial Court to make such finding.

Dated, San Francisco, California,
March 31, 1948.

Respectfully submitted,

FRED N. HOWSER,

Attorney General of the State of California,

HAROLD B. HAAS,

Deputy Attorney General of the State of California,

MIRIAM E. WOLFF,

Deputy Attorney General of the State of California,

Attorneys for Appellant.

No. 11797

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

STATE OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

A. DEVITT VANECH,

Assistant Attorney General.

M. MITCHELL BOURQUIN,

*Special Assistant to the Attorney General,
San Francisco, California.*

JOHN F. COTTER,

GEORGE S. SWARTH,

ELIZABETH DUDLEY,

*Attorneys, Department of Justice,
Washington, D. C.*

FILE

MAY - 6 1934

DEAL P. J. J. J.

INDEX

| | Page |
|---|------|
| Opinion below..... | 1 |
| Jurisdiction..... | 1 |
| Question presented..... | 2 |
| Statement..... | 2 |
| Argument: | |
| Appellant's interest in the lands condemned has only a nominal value..... | 3 |
| Conclusion..... | 8 |

CITATIONS

Cases:

| | |
|---|------|
| <i>Berton v. All Persons</i> , 176 Cal. 610, 170 Pac. 151..... | 4 |
| <i>California, State of v. United States</i> , 153 F. 2d 558..... | 2 |
| <i>Crease v. Jarrell</i> , 65 Cal. App. 554, 224 Pac. 762..... | 4 |
| <i>Danielson v. Sykes</i> , 157 Cal. 686, 109 Pac. 87..... | 4 |
| <i>Davidow v. Griswold</i> , 23 Cal. App. 188, 137 Pac. 619..... | 4 |
| <i>Eltinge v. Santos</i> , 171 Cal. 278, 152 Pac. 915..... | 4 |
| <i>Inyo, County of v. Given</i> , 183 Cal. 415, 191 Pac. 688..... | 7 |
| <i>Jefferson County v. Tennessee Valley Authority</i> , 146 F. 2d 564, certiorari denied, 324 U. S. 871, rehearing denied, 324 U. S. 891..... | 8 |
| <i>McGinn v. State Board of Harbor Comrs.</i> , 113 Cal. App. 695, 299 Pac. 100..... | 4, 6 |
| <i>Mayor and City Council of Baltimore v. United States</i> , 147 F. 2d 786..... | 4, 8 |
| <i>Petitpierre v. Maguire</i> , 155 Cal. 242, 100 Pac. 690..... | 4 |
| <i>Syers v. Dodd</i> , 120 Cal. App. 444, 8 P. 2d 157..... | 4 |
| <i>United States v. Alderson</i> , 53 F. Supp. 528..... | 8 |
| <i>United States v. Benedict</i> , 280 Fed. 76..... | 5, 7 |
| <i>United States v. Des Moines County</i> , 148 F. 2d 448, certiorari denied, 326 U. S. 743..... | 8 |
| <i>United States v. Dunnington</i> , 146 U. S. 338..... | 6 |
| <i>United States v. 0.886 of an Acre of Land</i> , 65 F. Supp. 827..... | 8 |
| <i>United States v. Los Angeles County</i> , 163 F. 2d 124..... | 7 |
| <i>United States v. Prince William County</i> , 9 F. Supp. 219, affirmed, 79 F. 2d 1007, certiorari denied, 297 U. S. 714..... | 8 |
| <i>Woodville v. United States</i> , 152 F. 2d 735, certiorari denied, 328 U. S. 842..... | 7 |

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11797

STATE OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court wrote no opinion. Its findings of fact and conclusions of law are at R. 40-47, 100-106, and 146-152.

JURISDICTION

These are appeals from three judgments in condemnation entered January 22, 1947 (R. 47-49, 107-109, 152-154). Notices of appeal were filed April 21, 1947 (R. 50, 110, 155). The cases were consolidated for trial (see R. 55-56) and for appeal (R. 58). The jurisdiction of the district court rests upon section 3 of the Act of July 19, 1940, 54 Stat. 779, 780, and the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. sec. 632 (R. 2, 66, 118). The juris-

diction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. Sec. 225a.

QUESTION PRESENTED

Whether land retained by the State of California for the sole purpose of providing ingress and egress to lots it had previously sold had more than a nominal value.

STATEMENT

The judgments appealed from (R. 47-49, 107-109, 152-154) award the State the sum of one dollar (\$1.00) for each of four parcels of submerged land condemned by the United States.¹

The lands were part of a larger tract of submerged land in the City and County of San Francisco condemned by the United States for the expansion of the Naval Dry Docks at Hunter's Point. The four parcels here involved aggregate 108.32 acres (R. 167-178) and were embraced in three complaints. After a trial without a jury (R. 165-270) the Court made separate

¹ The question involved on these appeals was earlier presented to this Court. *State of California v. United States*, 153 F. 2d 558 (1946). There, in a trial to determine just compensation for a block of submerged land formerly owned by James S. Hutchinson, the successor in interest of the State's grantee, the State filed an answer claiming compensation for the streets touching the Hutchinson block. The trial court found that the State's interest in these streets had no pecuniary value. The State appealed. This Court said (153 F. 2d at p. 559): "It was error to permit the State to intrude into the Hutchinson valuation proceeding * * *. Its claim for compensation * * * should be asserted as one claim and not split into fractional demands which it may have judicially determined by the piecemeal method here employed." Accordingly, it struck that part of the judgment which denied the State any recovery.

findings of fact and conclusions of law in respect of the property included in each complaint (R. 40–47, 100–106, 146–152). However, the findings and conclusions differ only in describing the particular properties. All may be summarized as follows:

Before September 9, 1850 (when California was admitted to the Union), the lands were covered by the waters of the Bay of San Francisco. They passed to the State when it was admitted. A state statute (Cal. Stats. 1867–1868, p. 716) created a Board of Tide Land Commissioners, which was directed, first, to take possession of all land in the City and County of San Francisco lying under water and, second, to cause all of the State's property lying south of Second Street to be surveyed into lots and blocks. Pursuant to the statute the Board had the land surveyed and prepared a "Map of Salt Marsh and Tide Lands and Lands Lying Under Water." In March 1869, it adopted the map. As the state statute also ordered, the Board at public auction sold its title to the lots exhibited on the map. These sales were by lots as described by the map. The interest retained by the State in the lands here involved was retained only for the purpose of providing ingress and egress to the lots sold and was subject to easements for access to and from the lots. Accordingly, the State was entitled to \$1.00 for each of the four parcels.

ARGUMENT

Appellant's interest in the lands condemned had only nominal value

The submerged lands were laid out in streets, blocks, and lots. As the trial court found (R. 43–44),

the lots were sold as such. Obviously, therefore, the interest retained by the State in the lands laid out as streets was retained only for the purpose of providing ingress and egress to the lots. *Berton v. All Persons*, 176 Cal. 610, 614-615, 170 Pac. 151 (1917); *Eltinge v. Santos*, 171 Cal. 278, 283, 152 Pac. 915 (1915); *Danielson v. Sykes*, 157 Cal. 686, 689, 109 Pac. 87 (1910); *Petitpierre v. Maguire*, 155 Cal. 242, 246-248, 100 Pac. 690 (1909); *Syers v. Dodd*, 120 Cal. App. 444, 8 P. 2d 157 (1932); *Crease v. Jarrell*, 65 Cal. App. 554, 559, 224 Pac. 762 (1924); *Davidow v. Griswold*, 23 Cal. App. 188, 192-194, 137 Pac. 619 (1913). Lands so burdened are not, despite appellant's contrary assertion (p. 5), entitled to be valued on the same basis as the lots to which they are servient. No one would buy lands which could be used only as public streets. Consequently, as has been held (*Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (C. C. A. 4, 1945)), they have only nominal value. And so the trial court adjudged.

Appellant argues, however (pp. 15-19), that it was not bound by the delineations of the map adopted by the Board of Tide Land Commissioners. In other words, it maintains that—notwithstanding it had sold lands on the basis that the owners could enter and leave them freely—it was free to sell the streets and thus block the owners from approaching their properties or imprison them there. The argument is without merit. *McGinn v. State Board of Harbor Comrs.*, 113 Cal. App. 695, 299 Pac. 100 (1931). In that case, under facts legally indistinguishable from those in the

case at bar, the California court upheld the right of a lot owner in the submerged area to access thereto by means of the adjacent land delineated as a street. It said (113 Cal. App. at pp. 702-703) :

The state, as the owner of these tidelands under special grant from the United States, was authorized to plot and sell the land into private ownership. *In order to make these sales* the tide land commissioners were directed to lay out the land in blocks and lots showing streets, lanes, alleys and other public places and to sell the land *by lot number*. * * * Having authorized the preparation of the map and having approved the map as filed with the streets, lanes, and other public places delineated thereon the state stood in the same position as all owners of private property and must, therefore, be deemed to have dedicated to public use all the public highways and places as delineated upon that map. *Having immediately sold these lots in accordance with the map the state was without authority thereafter to withdraw from public use any of the streets shown upon the map* * * *. [Italics supplied.]

Appellant argues at length (pp. 5-15) that in testifying that the value of land laid out for streets was reflected in the value of the abutting property, the Government's witnesses fell into an error condemned in *United States v. Benedict*, 280 Fed. 76, 82-83 (C. C. A. 2, 1922). But the facts in the *Benedict* case were unlike those in the case at bar. There, the United States condemned a tract of submerged land and acquiesced in the trial court's finding that it was worth

in the aggregate \$2.00 a square foot. Consequently, it was not concerned in the subsequent contest as to distribution of the award. *United States v. Dunnington*, 146 U. S. 338, 352. This contest was waged between the Langley Estate, which had formerly owned the entire area, and New York City, to which the Estate had conveyed 81,120 square feet, in trust to be laid out in streets. The district court distributed the entire amount to the Estate. In reversing and holding that the City should have an aliquot part of the award, the Circuit Court of Appeals said (280 Fed. at pp. 82-83):

* * * the Langley Estate has been awarded all that the land is worth, streets and all, because, *when streets are opened*, the land they have left *will* be worth the amount of the award. This will not do. The government is called upon to make just compensation for things *as they are, not as they may be hereafter* * * *. [Italics supplied.]

The Government agrees that in the case at bar "it must make compensation for things as they are, not as they may be hereafter." But, as the trial court found, the streets here involved were laid out at least as early as 1869 (p. 3, *supra*). As it also found, the privately owned lots which the United States has acquired were sold by appellant on the premise that they abutted these streets. And, according to *McGinn v. State Board of Harbor Com'rs*, 113 Cal. App. 695, 703, 299 Pac. 100 (1931), the appellant cannot change its position. The evidence, quoted by appellant at pp. 9-11, was that the value of the property had been

increased fivefold by subdivision on this basis. In paying property owners on this basis, the United States has made compensation "for things as they are." This is unlike the *Benedict* case in which the property was given an over-all square-foot value rather than one based on the projected subdivision.

Appellant argues (pp. 15-20) that the dedication was not binding because never accepted by any authority. However, as indicated in *County of Inyo v. Given*, 183 Cal. 415, 420 191 Pac. 688 (1920), quoted (pp. 18-19) by appellant, acceptance by the public is not necessary to consummate a dedication so far as concerns the rights of those who buy property by reference to a subdivision map showing streets. Here, the United States has acquired the rights of such purchasers and is entitled to assert those rights in determining what is just compensation to the State when it takes the streets.

In saying (280 Fed. at p. 82) that the fact real estate "is held in trust for a public purpose does not in any way change its market value," the Second Circuit was wrong. It cannot be imagined why anyone would pay money to acquire property "held in trust for a public purpose." This being so, such property could have no market value. But the dictum was not tested; it was not involved in the affirming decision of the Supreme Court. 261 U. S. 294 (1923). It has not been followed in the later cases where streets have been condemned. *United States v. Los Angeles County*, 163 F. 2d 124 (C. C. A. 9, 1947); *Woodville v. United States*, 152 F. 2d 735 (C. C. A.

10, 1946), certiorari denied 328 U. S. 842; *United States v. Des Moines County*, 148 F. 2d 448 (C. C. A. 8, 1945), certiorari denied 326 U. S. 743; *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (C. C. A. 4, 1945); *Jefferson County v. Tennessee Valley Authority*, 146 F. 2d 564 (C. C. A. 6, 1945), certiorari denied 324 U. S. 871, rehearing denied 324 U. S. 891; *United States v. Prince William County*, 9 F. Supp. 219 (E. D. Va. 1934), affirmed 79 F. 2d 1007 (C. C. A. 4, 1935), certiorari denied 297 U. S. 714; *United States v. 0.886 of an Acre of Land*, 65 F. Supp. 827 (E. D. N. Y. 1946); *United States v. Alderson*, 53 F. Supp. 528 (S. D. W. Va. 1944).

CONCLUSION

For the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted.

A. DEVITT VANECH,
Assistant Attorney General.

M. MITCHELL BOURQUIN,
Special Assistant to the Attorney General,
San Francisco, California.

JOHN F. COTTER,
GEORGE S. SWARTH,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington, D. C.

MAY 1948.

No. 11,797

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

STATE OF CALIFORNIA,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Upon Appeal from the District Court of the United States
for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

FRED N. HOWSER,

Attorney General of the State of California,

HAROLD B. HAAS,

Deputy Attorney General of the State of California,

MIRIAM E. WOLFF,

Deputy Attorney General of the State of California,

600 State Building, San Francisco 2, California,

Attorneys for Appellant.

FILED

MAY 19 1948

PAUL P. O'BRIEN,

CLERK

Subject Index

| | Page |
|---|------|
| Introduction | 1 |
| Argument | 2 |
| I. | |
| Appellee's contention that the strips of land were "streets" is unfounded | 2 |
| II. | |
| Appellee's distinction of the case of United States v. Bene- dict, 261 U. S. 294 is improper | 8 |
| Conclusion | 12 |

Table of Authorities Cited

| Cases | Pages |
|--|---------------|
| Archer v. Salinas City, 93 Cal. 43 | 5, 6 |
| Berton v. All Persons, 176 Cal. 610..... | 5, 11 |
| City of Anaheim v. Langenberger, 134 Cal. 608 | 6 |
| City of Sacramento v. Clunie, 120 Cal. 29 | 6 |
| Danielson v. Sykes, 157 Cal. 686 | 8 |
| Davidow v. Griswold, 23 Cal. App. 188 | 5 |
| Diggins v. Hartshorne, 108 Cal. 154 | 4, 6 |
| Eltinge v. Santos, 171 Cal. 278..... | 5 |
| Jefferson County v. Tennessee Valley Authority, 146 F. (2d) 564 | 11 |
| Joens v. Baumbach, 193 Cal. 567 | 11 |
| Los Angeles v. Kysor, 125 Cal. 463 | 6 |
| Macadamizing Co. v. Williams, 70 Cal. 534 | 11 |
| Mayor and City Council of Baltimore v. United States, 147 F. (2d) 786 | 9 |
| McGinn v. Harbor Commissioners, 113 Cal. App. 695..... | 3, 4, 5, 6, 7 |
| People v. Williams, 64 Cal. 498 | 4, 6 |
| Severy v. C. P. R. R. Co., 51 Cal. 194..... | 11 |
| United States v. Alderson, 53 F. Supp. 528 | 11 |
| United States v. Benedict, 280 F. 76 (affirmed 261 U. S. 294) | 8, 9, 12 |
| United States v. 0.886 of an Acre of Land, 65 F. Supp. 827 | 11 |
| United States v. Los Angeles County, 163 F. (2d) 124..... | 9 |
| United States v. Prince William County, 9 F. Supp. 219 (affirmed 79 Fed. (2d) 1007) | 9 |
| Warden v. South Pasadena Realty Co., 178 Cal. 440 | 11 |
| Woodville v. United States, 152 F. (2d) 735 | 11 |

Statutes

| | |
|--|---|
| California Statutes 1867-8, p. 716 | 3 |
|--|---|

No. 11,797

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STATE OF CALIFORNIA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

INTRODUCTION.

The first point in appellee's brief with which we desire to take issue is its statement of the question which is presented on this appeal. This statement of appellee assumes one of the very questions which are at issue before this Court, to-wit: "whether the land of the State of California was retained for the sole purpose of providing ingress and egress." We do not concede that this is the case.

On the contrary, we believe that the question before the Court is:

"What is the proper value to be ascribed to land retained by the State of California in full fee ownership where the land at the date of the

taking lies 20 feet under the waters of the Bay, and where the adjacent property had been conveyed out of the State of California pursuant to an Act of 1868 (Statutes 1867-8, page 716)."

ARGUMENT.

I.

APPELLEE'S CONTENTION THAT THE STRIPS OF LAND WERE "STREETS" IS UNFOUNDED.

Appellee's argument presupposes that the strips of land, which are the subject of this litigation, were retained for the purpose of providing access for ingress and egress to the lots. It is our position that even if this Court finds that situation to be the fact the State is still entitled to more than nominal value by reason of the fact that the land was not used for ingress and egress and was in exactly the same condition as the adjacent property. However, we do not concede that the strips were retained only for ingress and egress. The statute under which these conveyances were made reads in part as follows:

"* * * After the establishment of the water line front as above provided, the Commissioners shall have all the property lying within the same belonging to the State surveyed, subject to the approval of the State Board, into lots and blocks in accordance with the official map survey of the City of San Francisco, *reserving so much thereof for streets, docks, piers, slips, canals, drains or other use necessary for the public convenience and the purposes of commerce, as in their judgment may be required*, and have two maps of

the same prepared showing the property as re-surveyed to the water line front, the streets, blocks, reservations, and everything necessary to be shown by such maps; * * *

* * *

“After the Commissioners shall have complied with the provisions of section four of this Act, they shall proceed to sell at public auction, and as hereinafter provided, in some public place in the City of San Francisco, all the right, title and interest of the State of California in and to the property in the lots described in section four. * * *” (Italics ours.)

California Statutes, 1867-8, p. 716.

In accordance with the mandate of the statute the State conveyed certain portions of the area of the condemnation and by specific direction of the statute retained title to part of the area, some of which latter portions are the subject of the State's claim in this litigation.

Appellee seeks to rely on the case of *McGinn v. State Board of Harbor Commissioners*, 113 Cal. App. 695, stating that in the *McGinn* case the California Court upheld the right of a lot owner in the submerged area to access from the street and contends that the *McGinn* case is indistinguishable from the case at bar.

We believe that the District Court reached a correct result in the *McGinn* case although in doing so the Court indulged in some unfortunate dictum, which dictum was totally unnecessary to the holding

of the case, and in all probability it is this dictum that has confused the appellee. The Court in the *McGinn* case does state that the Act of 1872 constituted a dedication. However, such a holding is directly contrary to the holding of the Supreme Court of this State in *Diggins v. Hartshorne*, 108 Cal. 154, where the Supreme Court stated:

“The terms of section 1 of the act do not require that the streets laid down upon the map shall have been actually opened and dedicated to public use before the supervisors could order their improvement. * * *

“While the declaration in the statute that the streets laid down upon the designated maps are open public streets, ‘for the purpose of this law,’ did not of itself make them in fact public streets if they were not so already, yet these spaces upon the maps were thereby identified as objects of reference by which to describe the limits of any improvement which might be made.”

Neither *Diggins v. Hartshorne*, 108 Cal. 154, nor *People v. Williams*, 621 Cal. 498, which contained a similar holding, were cited in the *McGinn* case and were obviously overlooked by the Court. However, the dicta referred to is completely unnecessary to the decision.

In the *McGinn* case the judgment granted an injunction to an abutting lot owner against an obstruction of the street in front of the lot *where both the lot and the street had been reclaimed*, and the street had been in use for approximately twenty-five years. This fact alone constitutes a primary distinction be-

tween the *McGinn* case and the case at bar. Therefore, the decision of the District Court holding that the lot owner had a right to unobstructed ingress and egress from his property was clearly right under the law of this State.

Davidow v. Griswold, 23 Cal. App. 188;

Archer v. Salinas City, 93 Cal. 43;

Berton v. All Persons, 176 Cal. 610;

Eltinge v. Santos, 171 Cal. 278.

The second point of distinction between the *McGinn* case and the case at bar is that the *McGinn* case involved Channel Street between Seventh Street and Carolina Street, and this area was expressly dedicated by the Legislature as an open public canal by the Act of March 26, 1868 (Stats. 1867-68, p. 355).

This Act referred only to Channel Street and had no application whatever to any of the area involved in this litigation. Insofar as the *McGinn* case opinion asserts that a sale of lots from a map thereby irrevocably dedicates the streets shown on the map to *public use*, it again misstates the law. In fact, its own language shows such misstatement:

“Having authorized the preparation of the map and having approved the map as filed with the streets, lanes, and other public places delineated thereon, the state stood *in the same position as all owners of private property*, and must therefore be deemed to have dedicated to public use all the public highways and places as delineated upon that map. Having immediately sold these lots in accordance with the map, the state was without authority thereafter to withdraw

from public use any of the streets shown upon the map.”

But, in fact, the right of such a private seller to withdraw the dedication so far as the public is concerned has long been established in this State.

Los Angeles v. Kysor, 125 Cal. 463;

City of Anaheim v. Langenberger, 134 Cal. 608;

City of Sacramento v. Clunie, 120 Cal. 29;

Archer v. Salinas City, 93 Cal. 43.

In summary, therefore, it can be pointed out that the decision in the *McGinn* case is clearly sound by reason of the fact that the area there in question has been reclaimed and used by the public under what at least amounted to color of authority for a period of from twenty or twenty-five years, that the property owners' rights to continue to have unobstructed passage was clearly established and the public's right to use the street had been clearly established. But the determination that the Acts of the Legislature did not constitute a dedication and that the sales by the Tidelands Commissioners did not constitute a dedication, had already been determined adversely to the dicta in the *McGinn* case by the Supreme Court of this State in the case of *People v. Williams*, 64 Cal. 498 and in the case of *Diggins v. Hartshorne*, 108 Cal. 154, neither of which is cited in the *McGinn* case. In the light of these authorities by our highest Court, appellee can take no comfort from the dicta of the District Court of Appeal in the *McGinn* case. It should also be borne in mind that the portion of Channel Street involved in the *McGinn* case was

an open public street, whereas the area involved in the case at bar lay from ten to twenty feet under the waters of the Bay of San Francisco, which fact, in itself, constitutes a primary distinction between the two cases. We are at a loss to understand how appellee can seriously contend that the area involved in the case at bar was impressed with an easement.

Appellee further argues that the abutting lot owners have a right appurtenant to their lots to have the areas laid down on the map as streets maintained as such, and from that premise appellee contends that the street areas are impressed with street easements, and that therefore their value is nominal. The cases cited by appellee for this proposition all dealt with situations where the streets were then available for use as such. The case at bar has a clear distinction in that it involved an area where reclamation was a physical condition precedent to the use of the streets as such. It has not been denied by the State that if the land were reclaimed the *potential* easement of the lot owners might ripen into a full easement. That is precisely the situation which occurred in the *McGinn* case; but if reclamation had taken place other values and factors would be present which would put an entirely different face upon the values of the State's interest in the area. If it is speculative to value the lots as though reclamation were completed, it is just as speculative to value the State's interest in the areas mapped as streets as though the reclamation had been completed. In the latter event the State would have other, much greater and com-

pensating values, and could willingly forego the value claimed for this area.

The cases relied upon by appellee have clearly pointed out that while the purchasers of the lots had a right to use the streets for purposes of ingress and egress, the sale itself did not constitute a public dedication.

In *Danielson v. Sykes*, 157 Cal. 686, 689, cited by appellee, the Court states:

“It is a thoroughly established proposition in this state that when one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, *and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, * * **”. (Italics supplied.)

II.

APPELLEE'S DISTINCTION OF THE CASE OF UNITED STATES v. BENEDICT, 261 U. S. 294 IS IMPROPER.

Appellee has cited eight cases to support its contention that the rule laid down in *United States v. Benedict*, 280 Fed. 76 (affirmed 261 U. S. 294), is no longer followed by the Courts. Not one of the cited cases are applicable to the situation either in the case at bar or in the *Benedict* case, and in citing

these cases as authority appellee has consistently overlooked the fundamental distinction between the *Benedict* case and the cases cited. It has been our contention throughout that the *Benedict* case is parallel with the case at bar, and so we likewise contend that the distinction which appellee endeavors to draw between the cases cited and the case at bar is unwarranted.

As we have pointed out at considerable length in our opening brief, in the *Benedict* case the land reserved for streets lay under the water and had never been used or opened as streets. Parenthetically, we again wish to note that the case at bar is stronger than the *Benedict* case since in the *Benedict* case the land owned by the city could only have been used as streets and we deny that such was true in the case at bar. However, appellee has cited as contrary to the *Benedict* case the following, all of which may be readily distinguished.

In *Mayor and City Council of Baltimore v. United States*, 147 Fed. (2d) 786, the Court states:

“The nature of the interest owned by the municipality in public streets and alleys, as contrasted with the interest of the abutting owners, has been defined by the courts of Maryland, and the decisions show that the view maintained by the City is untenable. The interest of the City in public streets and alleys is not for all practical purposes equivalent to a fee. It is true that when land is dedicated to the City for street purposes, the City acquires as trustee for the public not only the easement of passage but also

the right to grade and improve the surface, and to lay drains, sewers and pipes for various utilities beneath the surface of the land. But, on the other hand, the person in whom the fee resides, e. g., the abutting owner, retains substantial rights notwithstanding the dedication. He may maintain trespass or ejectment or waste for the invasion of his rights, such as the unauthorized deposit of material or rubbish upon the soil" (cases cited); "he may demand compensation for an additional servitude, for example, the erection of telephone poles" (cases cited), "and he retains riparian rights in adjacent waters even when the public authority requires an easement for a highway along the shore" (cases cited). "In other words, the interest of the abutting owner is not a contingent interest but a present subsisting ownership of the fee, subject only to the easement in favor of the public; and if, for any reason, the easement is abandoned, the entire beneficial interest in the land reverts to him." (Cases cited) (147 Fed. (2d) 786, 788-9.)

In *United States v. Prince William County*, 9 F. Supp. 219 (aff'd 79 Fed. (2d) 1007), the award of the area lying under the street was given to the adjoining property owner since under the law of Virginia the adjoining owner took to the center of the street.

In *United States v. Los Angeles County*, 163 Fed. (2d) 124, the county owned only an easement and did not own the fee.

The above three cases are distinguished from the case at bar since the rule is well established in California that the grantee of a metes and bounds description to a line of a street takes title only to the line.

Warden v. South Pasadena Realty Co., 178 Cal. 440, 442;

Berton v. All Persons Etc., 176 Cal. 610, 614;

Joens v. Baumbach, 193 Cal. 567, 571;

Macadamizing Co. v. Williams, 70 Cal. 534, 541;

Severy v. C. P. R. R. Co., 51 Cal. 194, 196.

In the following cases cited by appellee, the Court reiterates its well-established rule that where a public street or road is taken the measure of compensation is the substitution of new facilities for the ones condemned.

Woodville v. United States, 152 F. (2d) 735;

Jefferson County v. Tennessee Valley Authority, 146 F. (2d) 564;

United States v. 0.866 of an Acre of Land, 65 F. Supp. 827;

United States v. Alderson, 53 F. Supp. 528.

All of these cases cited above are the ones cited by appellee under the proposition that the rule of the *Benedict* case is no longer followed. However, in each and every one of the cited cases the streets condemned were used as streets and roads and had long been impressed with an easement. None of these cases are parallel either to the case at bar or to the *Benedict* case for in both of the latter the so-called streets had never been used for ingress or egress to

property and in both instances the strips of land lay under water. It is true that appellee refers to the rule of the *Benedict* case as a dictum but in so doing appellee has overlooked the fundamental principle of that case.

Appellee has endeavored to distinguish the *Benedict* case by contending that an award there was made for the whole and that the problem before the Court was the proper apportionment of the award. Obviously, this is no distinction at all. The only difference between the *Benedict* case and the case at bar is that in the *Benedict* case only the Langley Estate and the city claimed an interest, whereas in the case at bar, in addition to the State, numerous land holders claimed an interest. The real point is that if the strips of land lying under the water were streets in the *Benedict* case then, as such, the city would only be entitled to nominal compensation, but if, as a matter of fact, all of the property lying under water is acreage then all of the owners are entitled to compensation for their proportionate share of the acreage. That is precisely what the Court held in the *Benedict* case and that is the point we are urging before this Court in the case at bar.

CONCLUSION.

It is respectfully urged that the judgment of the trial Court awarding nominal damages to the appellant, State of California, on Parcels 3A and 3B in case No. 22147, and Parcel 2 in case No. 22261, and

Parcel 2 in case No. 22416 be reversed and that this Court either find the value of this property or direct the trial Court to make such finding.

Dated, San Francisco, California,
May 12, 1948.

Respectfully submitted,

FRED N. HOWSER,

Attorney General of the State of California,

HAROLD B. HAAS,

Deputy Attorney General of the State of California,

MIRIAM E. WOLFF,

Deputy Attorney General of the State of California,

Attorneys for Appellant.

No. 11798

United States
Circuit Court of Appeals
For the Ninth Circuit.

PUEBLO TRADING CO., a corporation,
Appellant,
vs.

EL CAMINO IRRIGATION DISTRICT, a public
corporation; B. A. OSBORN, S. E. AYER,
J. P. BURTON, WALTER MAYES and
WALTER BUNTING, Members of the Board
of Supervisors of Tehama County, and W. E.
ROCHFORD, Assessor of Tehama County,
California,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

JAN 6 1948

PAUL P. O'BRIEN,
CLERK

No. 11798

United States
Circuit Court of Appeals
For the Ninth Circuit.

PUEBLO TRADING CO., a corporation,
Appellant,
vs.

EL CAMINO IRRIGATION DISTRICT, a public
corporation; B. A. OSBORN, S. E. AYER,
J. P. BURTON, WALTER MAYES and
WALTER BUNTING, Members of the Board
of Supervisors of Tehama County, and W. E.
ROCHFORD, Assessor of Tehama County,
California,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Affidavit of H. R. Anderson..... | 16 |
| Affidavit in Opposition to Order to Show Cause | 19 |
| Letter from Attorney General to W. E. | |
| Rochford, 9/23/46 | 21 |
| Affidavit of Service..... | 26 |
| Affidavit of W. Coburn Cook..... | 14 |
| Appeal: | |
| Notice of..... | 29 |
| Statement of Points and Assignment of | |
| Errors on | 30 |
| Designation of Contents of Record on..... | 31 |
| Certificate of Clerk to Transcript on..... | 32 |
| Statement of Points on Which Appellant | |
| Intends to Rely on..... | 34 |
| Attorneys | 1 |
| Certificate of Clerk to Transcript on Appeal... | 32 |
| Complaint | 2 |
| Demurrer to Affidavit for Order to Show Cause | 18 |
| Designation of Contents of Record on Appeal.. | 31 |
| Designation of Contents of Record on Appeal | |
| and for Printing..... | 35 |

| | |
|--|----|
| Judgment by Default..... | 6 |
| Notice of Appeal..... | 29 |
| Notice and Demand..... | 24 |
| Opinion and Order..... | 27 |
| Order to Show Cause re Contempt..... | 12 |
| Points and Authorities in Support of Demurrer | 23 |
| Statement of Points and Assignment of Errors on Appeal..... | 30 |
| Statement of Points on Which Appellant In- tends to Rely on Appeal..... | 34 |

ATTORNEYS

W. COBURN COOK, ESQ.,
Berg Bldg.,
Turlock, Calif.,
Attorney for Appellant.

L. C. SMITH, ESQ.,
Redding, Calif.,

DOWNEY, BRAND, SEYMOUR & ROHWER,
Capital National Bank Bldg.,
Sacramento, Calif.,

EDMUND M. MOOR, ESQ.,
District Attorney,
Red Bluff, Calif.,
Attorneys for Appellee.

In the District Court of the United States
Northern District of California, Northern Division
No. 5082 Civ.

PUEBLO TRADING CO., a Corporation,
Plaintiff,

vs.

EL CAMINO IRRIGATION DISTRICT,
a Public Corporation,
Defendant.

COMPLAINT

The plaintiff complains and alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Nevada and resident therein.

II.

That the defendant is a public corporation, namely, an irrigation district organized and existing under and by virtue of "the California Irrigation District Act" of the State of California, being California Statutes 1897, page 254, as amended, and a resident of the State of California, and having its location and principal place of business at or near the town of Gerber in the County of Tehama, in said Northern District of California, Northern Division. [1*]

* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

III.

That the amount in controversy, and which is the subject of this action, is upwards of \$3000.00, exclusive of interest.

IV.

That heretofore the defendant Irrigation District duly issued, sold and delivered its interest bearing coupon general obligation bonds in the principal amount of \$430,000.00, or thereabouts, which said bonds were each in the principal amount of \$1000, and bore interest at the rate of 6 per cent per annum from date of issuance until payment, which said interest was represented by coupons due semi-annually from date of issuance to date of maturity.

V.

That the plaintiff is the owner and holder of certain of said interest bearing bonds in the principal amount of \$53,000.00 all of which became due, and although demand therefor has been made for payment, are unpaid, and which said bonds are more particularly described as follows, namely:

Bonds No. 27 to 36 inclusive, which became due January 1, 1939, and were presented for payment to the Treasurer of said Irrigation District, and stamped and registered for non-payment, under the provisions of Sections 24504 and 24505 of the Water Code of the State of California, and

Bonds No. 37 to 42 inclusive and No. 46 to 50 inclusive which matured January 1, 1940, and were

presented as aforesaid to the said Treasurer and stamped on January 2, 1940, and

Bonds No. 51 to 56 inclusive and No. 59 to 65 inclusive which fell due January 1, 1941, and were presented as aforesaid and stamped January 2, 1941, and

Bonds No. 66, 67 and 68 due January 1, 1942, which were presented and stamped as aforesaid January 1, 1942, except

That of the aforesaid bonds No. 62 to 65 were presented [2] and stamped on January 16, 1941, and

Bonds No. 7, 8 and 11, which became due January 1, 1937, were presented and stamped as aforesaid June 24, 1937, and

Bonds No. 17 to 23 inclusive, which became due January 1, 1938, were presented and stamped as aforesaid January 3, 1938, and

Also Bond No. 74 which became due January 1, 1942, and Bonds No. 103, 104, 106, 107 and 108, which became due January 1, 1944, and have never been stamped under the provisions of said sections of the Water Code or otherwise.

VI.

That the whole of said bonds and each of them is due, owing and unpaid, and that the said bonds which were registered as aforesaid and stamped, bear interest at the rate of 7 per cent per annum from their respective dates of presentation and registration, and that said bonds No. 74, 103, 104, 106, 107 and 108 bear interest at the rate of 6 per

cent per annum from their respective dates until maturity, and that none of said interest has been paid although demand therefor has been made.

Wherefore, plaintiff prays for judgment against the defendant for the sum of \$53,000 principal, together with interest at 7 per cent per annum on the said registered bonds from their respective dates of presentation and stamping thereof to date of judgment, and at the rate of 6 per cent per annum on the said unregistered bonds from the date of maturity thereof until date of judgment, for plaintiff's costs of suit, and for such other relief as may be proper.

W. COBURN COOK,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 1, 1945. [3]

Office of the Sheriff
of the County of Tehama—ss.

I hereby certify that I received the annexed Summons on the 6th day of January, A.D. 1945, and that I personally served the said Summons and a copy of the complaint therein referred to, upon the hereinafter named defendant, personally, in the County of Tehama, State of California, by delivering to and leaving with each of said hereinafter named defendant a copy of said Summons and a copy of said Complaint at the time set opposite his name respectively.

Name of Defendant served: Roy Pyle as Secretary of the El Camino Irrigation District, a public corporation.

Time of service: Jan. 10, 1945.

Dated at Red Bluff this 10th day of January, 1945.

J. N. FROOME,
Sheriff,

By EDWARD MOLLER,
Deputy Sheriff. [4]

In the District Court of the United States
Northern District of California, Northern Division

No. 5082 Civ.

PUEBLO TRADING CO., a Corporation,
Plaintiff,

vs.

EL CAMINO IRRIGATION DISTRICT,
a Public Corporation,
Defendant.

JUDGMENT BY DEFAULT

In this action the defendant El Camino Irrigation District having been served with summons and complaint, and having failed to answer the complaint or to appear herein, and the time for answering and appearing having expired, and the default of said defendant having been duly entered

upon application of plaintiff by and through plaintiff's attorney W. Coburn Cook, Esq.

It Is Hereby Ordered, Adjudged, and Decreed that the plaintiff Pueblo Trading Co., a corporation, have and recover from the defendant El Camino Irrigation District, a Public Corporation, the sum of \$53,000.00 principal and \$18,181.65 interest, plus costs in the sum of \$19.00, and that said amounts shall bear interest from the date hereof until paid at the rate of 7 per cent per annum.

It Is Further Ordered that the defendant El Camino [5] Irrigation District make provision for the payment of this judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided under the provisions of Division 11 of the Water Code of the State of California, and that upon the failure or refusal of the defendant and its officers to make such provision, that the Board of Supervisors and other officers of the County of Tehama, State of California, make provision for the payment of this judgment by levying and collecting assessments against the lands in said district in the manner provided by the said Division 11 of the Water Code of the State of California, and that for that purpose this Court retain jurisdiction of the cause and that the plaintiff may apply to the Court for such further relief as may be appropriate to obtain satisfaction of the judgment.

It Is Further Ordered that the plaintiff is entitled to have this judgment paid out of funds

available for payment under the provisions of said Water Code in the order in which the bonds, upon which this action is brought, were presented to the Treasurer of said district as alleged in paragraph V of the complaint, and the Court determines that the dates of presentation of said bonds are as follows:

Bonds 27 to 36 inclusive, Tot. Prin. Amount \$10,000.00 presented January 1, 1939.

Bonds 37 to 42 and 46 to 50 inclusive, Tot. Prin. Amount \$13,000.00, presented January 2, 1940.

Bonds 51 to 56 inclusive and 59 to 61 inclusive, Totl. Prin. Amount \$7,000.00, presented January 2, 1941.

Bonds 66, 67, 68, Tot. Prin. Amount \$3,000.00, presented January 1, 1942.

Bonds 62 to 65 inclusive, Tot. Prin. Amount \$4,000.00, presented January 16, 1941.

Bonds 7, 8 and 11, Tot. Prin. Amount \$3,000.00, presented [6] June 24, 1937.

Bonds 17 to 23 inclusive, Tot. Prin. Amount \$7,000.00, presented January 3, 1938.

Bonds 74, 103, 104, 106, 107, 108, Tot. Prin. Amount \$6,000.00, were not presented, but priority is established as of the date of the entry of this judgment.

Dated, February 13th, 1945.

MARTIN I. WELSH,

Judge U. S. District Court.

[Endorsed]: Filed Feb. 13, 1945. [7]

Office of the Sheriff
of the County of Tehama—ss.

I hereby certify that I received the annexed copies of Judgment on the 2nd day of Sept., A.D. 1946, and that I personally served the said copies of judgment upon the hereinafter named defendants, personally, in the County of Tehama, State of California, by delivering to and leaving with each of said hereinafter named defendants a copy of said copies of judgment at the time set opposite their names respectively.

Name of defendants served: L. F. Carpenter as Director of the El Camino Irrig. District; Ludwig Witte as Director of the El Camino Irrig. District.

Time of service: Sept. 27, 1946.

Dated at Red Bluff, California, this 27th day of Sept., 1946.

J. N. FROOME,
Sheriff.

By EDWARD MOLLER,
Deputy Sheriff. [8]

Office of the Sheriff
of the County of Tehama—ss.

I hereby certify that I received the annexed Certified copies of Judgment on the 2nd day of Sept., A.D. 1946, and that I personally served the said Judgments upon the hereinafter named defendants, personally, in the County of Tehama, State of California, by delivering to and leaving with each of said hereinafter named defendants a copy of said Judgments at the time set opposite their names respectively.

Name of defendant served: Arthur Ludeman as District Attorney of Tehama County; W. E. Rochford as Assessor of Tehama County.

Time of service: September 5, 1946.

Name of defendant served: Crescent Upton as Treasurer of Tehama County.

Time of service: September 12, 1946.

Dated at Red Bluff, California, this 5th day of September, 1946.

J. N. FROOME,
Sheriff. [9]

Office of the Sheriff,
of the County of Tehama—ss.

I hereby certify that I received the annexed Judgment by Default on the 19th day of August, A.D. 1946, and that I personally served the said Judgment upon the hereinafter named defendants, personally, in the County of Tehama, State of California, by delivering to and leaving with each of said hereinafter named defendants a copy of said Judgment at the time set opposite their names respectively.

Name of defendant served: B. A. Osborn as Chairman of the Board of Supervisors of Tehama County, and Sam Ayers, J. P. Burton, G. L. Childs and Walter Mayes as members of the Board.

Time of service: August 19, 1946.

Name of defendant served: Cornie Grootveld as a Director of the El Camino Irrigation District.

Time of service: August 28, 1946.

Dated at Red Bluff, California, this 28th day of August, 1946.

J. N. FROOME,
Sheriff. [10]

[Title of District Court and Cause.]

ORDER

Upon reading and filing the affidavit of W. Coburn Cook, Esq., on behalf of the plaintiff herein, and it appearing therefrom that the supervisors and officers of the County of Tehama, State of California, have failed and refused to carry out the judgment and order of this court requiring them to make provision for the payment of the judgment herein by the levy and collection of taxes and assessments, and good cause appearing therefor,

It Is Ordered that the said Board of Supervisors and officers of Tehama County, California, namely B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and Walter Bunting, members of Tehama County Board of Supervisors, and W. E. Rochford, Assessor of Tehama County, show cause before this court on the 18th day of August, 1947, at the hour of 3 o'clock p.m., in the Court Room of this Court in the Postoffice Building in Sacramento, California, why they and each of them should not be punished for contempt of court for disobedience of the judgment [11] made and entered herein on the 13th day of February, 1945, and why such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein.

This order may be served by the Sheriff of Tehama County and shall be so served at least ten days before the time of the hearing set forth above.

Dated, July 7, 1947.

DAL M. LEMMON,
Judge, U. S. District Court.

[Endorsed]: Filed July 7, 1947. [12]

Office of the Sheriff
of the County of Tehama—ss.

I hereby certify that I received the annexed Order on the 13th day of August, A.D. 1947, and that I personally served the said Order upon the hereinafter named defendant, personally, in the County of Tehama, State of California, by delivering to and leaving with each of said hereinafter named defendant a copy of said Order at the time set opposite his name respectively.

Name of defendant served: W. E. Rochford as County Assessor.

Time of service: August 13, 1947.

Dated at Red Bluff, California, this 13th day of August, 1947.

J. N. FROOME,
Sheriff. [13]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Stanislaus—ss.

W. Coburn Cook, being duly sworn, says:

He is attorney for the plaintiff Pueblo Trading Co. in this case; that on or about February 13, 1945, a judgment was entered in this Court against the defendant, which said judgment contained provisions requiring the Board of Supervisors and other Officers of the County of Tehama, State of California, to make provision for the payment of the judgment herein by levying and collecting assessments against the lands in the district as provided by Division 11 of the Water Code of the State of California; that thereafter a certified copy of said judgment was served upon the Board of Directors of defendant El Camino Irrigation District, said directors being Cornie Grootveld, L. F. Carpenter and Ludwig Witte; that a certified copy of said judgment was also served upon the Board of Supervisors of Tehama County, being B. A. Osborn, Sam Ayers, [14] J. P. Burton, G. L. Childs and Walter Mayes, and that a certified copy of said judgment was served upon Arthur Ludeman as District Attorney of Tehama County, W. E. Rochford as Assessor of Tehama County, Crescent Upton as Treasurer of Tehama County, all as appears

from affidavits of J. N. Froome, Sheriff, and Edward Moller, Deputy Sheriff of Tehama County, California. That there are three directors of El Camino Irrigation District.

That in January, 1947, a notice was served upon a majority of the Board of Supervisors of said county, which notice was in words and figures as set forth in Exhibit A hereunto annexed and made a part hereof by this reference.

That the Board of Supervisors of said county, the County Assessor, and Treasurer and Tax Collector, and the District Attorney aforesaid, as well as the Directors and Officers of the El Camino Irrigation District, have failed to make provision for the payment of the judgment herein by levying or collecting assessments against the lands in said district as provided in the Water Code of the State of California and refuse to do so.

Wherefore, plaintiff herein prays that an order be issued citing the supervisors and the aforesaid named officers of the County of Tehama to show cause before this court why they should not be punished for contempt of court for failure to carry out the orders of this court; and that such further order be made in the premises as will insure provision for payment of said judgment by levy and collection of taxes and assessments on the lands as said district as provided by law.

This affidavit is made by the attorney of record

for the plaintiff because he is better informed of the facts than the officers of the corporation.

W. COBURN COOK.

Subscribed and sworn to before me this 27th day of June, 1947.

[Seal] GILBERT MOODY,
Notary Public in and for the County of Stanislaus,
State of California.

[Endorsed]: Filed July 7, 1947. [15]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Stanislaus—ss.

H. R. Anderson, being duly sworn, says:

That he is Secretary of the Pueblo Trading Co., a Corporation, plaintiff in the above entitled action, and that said corporation is organized and incorporated under the laws of the State of Nevada and has its residence therein; and that the defendant El Camino Irrigation District is a public corporation of the State of California, which was organized under the provisions of Statutes 1897, page 254, as amended, and that said public corporation is located in and has its principal place of business in the County of Tehama, California;

That all of the facts set forth in the complaint are true and that the plaintiff is the owner and

holder of the bonds described therein in the principal face amount of \$53,000.00, and that said bonds are due, owing and unpaid, and became due upon the dates set forth in paragraph V of said complaint, and that those bonds, which were stated in said complaint to have been [16] presented for payment, were presented for payment at the time therein stated, and bear interest at the rate of 7 per cent from and after the dates whereon they were presented and up to the time of *their* being so presented bear interest at the rate of 6 per cent, and that those said bonds which were not presented for payment bear interest at the rate of 6 per cent from the date of their maturity until paid, and that the amount of said interest so due is the sum of Eighteen Thousand One Hundred Eighty-one and 65/100 Dollars (\$18,181.65).

H. R. ANDERSON.

Subscribed and sworn before me this 2nd day of February, 1945.

[Seal] /s/ GILBERT MOODY,
Notary Public in and for the County of Stanislaus,
State of California.

[Endorsed]: Filed Feb. 9, 1945. [17]

[Title of District Court and Cause.]

DEMURRER TO AFFIDAVIT FOR
ORDER TO SHOW CAUSE

The Supervisors and officers of the County of Tehama, State of California, demur to Plaintiff's affidavit for order to show cause on the following grounds:

I.

That judgment in the above entitled matter goes beyond the Complaint in that it directs the levy of an assessment to pay the judgment, and there appears to be nothing in the Complaint which supports such a decree.

II.

That the provisions of the Judgment concerning the levying and collecting of an assessment are beyond the prayer of the judgment and are therefore ineffective, particularly in view of the fact that neither the County nor any of the county officers were made parties to the proceedings or brought before the Court by any process whatsoever. [18]

III.

That it does not appear from the Affidavit of Plaintiff on file herein that plaintiff has pursued the remedy provided to it by Sections 26550 to 26553, inclusive, of the Water Code of the State of California.

Dated, August 11, 1947.

EDMUND M. MOOR,

Attorney for Board of Supervisors of the County
of Tehama.

[Endorsed]: Filed Aug. 14, 1947. [19]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO
ORDER TO SHOW CAUSE

State of California,
County of Tehama—ss.

Edmund M. Moor, being first duly sworn, deposes and says:

That he is the duly elected, qualified and acting District Attorney of the County of Tehama and that as such District Attorney he is the official legal adviser of the Board of Supervisors of said County and of the officers of said County, and makes this affidavit for and on behalf of the Board of Supervisors and officers named in the Order to Show Cause issued by the above entitled court in this matter.

That for the reasons stated in the Board of Supervisor's Demurrer herein filed, and upon the advice of the office of the Attorney General of the State of California, embodied in that certain letter dated September 23, 1946, a copy of which is hereto attached, it was your affiant's advice to said Board of [20] Supervisors and to the officers of the County of Tehama that they do not at this time levy the assessment set forth in the judgment obtained in this matter on February 13, 1945.

That your affiant and Board of Supervisors and officers of the County of Tehama, hold this Court in the highest regard and refrain from carrying out

the order embodied in said judgment solely and only for the reason that they desire the opportunity to have their day in Court.

That the Board of Supervisors and the officers of Tehama County are of the opinion that it would be inequitable to levy an assessment based upon this judgment of \$50,000.00 when as a matter of fact, there are other outstanding bonds and interest on bonds in a far greater sum than is involved in this suit.

That in their opinion to levy an assessment at this time for the entire outstanding indebtedness would fly directly in the face of the controlling law on this subject as announced in the case of El Camino Land Corporation v. the Board of Supervisors of Tehama County, 43 Cal. App. 2nd. 351, and City of Asbury Park vs. Christmas, 78 Fed. 2nd, 1003, in which cases the Court held Writs of Mandate were denied solely because to have enacted the assessment would have produced economic chaos and would have been inequitable.

Wherefore your affiant prays that the Order to Show Cause heretofore issued in the above entitled matter be denied.

EDMUND M. MOOR.

Subscribed and sworn to before me, this 12th day of August, 1947.

[Seal] ALICE E. DAVIS,
County Clerk in and for the County of Tehama,
State of California.

[Endorsed]: Filed Aug. 14, 1947. [21]

[Letterhead Attorney General, State of California]

September 23, 1946.

Mr. W. E. Rochford
Tax Collector
Tehama County
Red Bluff, California

Dear Walter:

While in Redding, you showed me a copy of a judgment in the case of Pueblo Trading Company, a corporation, vs. El Camino Irrigation District, a public corporation, No. 5082 District Court of the United States, Northern District, Northern Division, which judgment was a default judgment against the Irrigation District for \$53,000 principal, \$18,181.65 interest, plus \$19.00 costs. The judgment purported to direct the District to levy an assessment to satisfy the judgment, and further provided that, upon failure or refusal of the District to make provision for payment by levying and collecting assessments, the Board of Supervisors and other county officials should do so. At the time we discussed the matter with Attorney L. C. Smith, in Redding, who represents the Irrigation District.

Since my return to Sacramento, I have checked the record in the case, and have also discussed it further with Attorney Stephen W. Downey, with whom the Chairman of the Board of Directors conferred concerning this default judgment. Mr. Downey sent me a copy of a letter which he had sent to Attorney Smith, and for your information, I send you enclosed a copy of that letter.

From our phone conversation on September 17, 1946, I understand that neither nor any of the County officials were served with a copy of this default judgment until after the tax rate for the County of Tehama had been fixed. We feel that the provisions in the judgment concerning the levying and collecting of an assessment are beyond the prayer of the judgment, and therefore, ineffective, particularly in view of the fact that neither the County nor any of the County officers were made parties to the proceeding or brought before the court by any process whatsoever.

We also feel that because of the fact that the judgment was not called to the attention of the County until after the fixing of the rate, that the County could not, in any way, be held guilty of a contempt for having failed to levy and collect an assessment. [22]

Accordingly, we do not believe that the County is required to do anything at this time, particularly in view of the doctrine of such cases as *El Camino Land Corporation vs. The Board of Supervisors of Tehama County*, 43 Cal. App. (2d) 351, and *City of Asbury Park vs. Christmas*, 78 Fed. (2d) 1003, wherein writs of mandate were denied solely because to have exacted the assessment would have produced economic chaos and would have been inequitable.

We strongly urge, however, that the Board of Supervisors and other County officials take this matter up with the Board of Directors of the Irrigation District and impress upon them the need to

work out a solution of their financial difficulties, because it is quite possible that, in proper proceedings, the County could be compelled to levy and collect an assessment to discharge such obligations.

With kindest personal regards, we are

Yours very truly,

ROBERT W. KENNY,

Attorney General.

By /s/ E. G. BENARD,

Deputy Attorney General.

EGB P

cc Attorney L. C. Smith

Attorney Stephen W. Downey. [23]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF DEMURRER

Glenn vs. Mitchell Co., 282 Fed. 440;
Securities Co. vs. Van Loben Sels, 13 Cal. App.
2nd, 265-269;
14 Cal. Jur. Page 906 and 10 Year Sup.;
Section 26550-26553, inclusive, Water Code of
California.

[Endorsed]: Filed Aug. 14, 1947.

[Title of District Court and Cause.]

NOTICE AND DEMAND

To the Board of Supervisors of Tehama County,
California:

You and each of you are hereby advised that the Directors of the El Camino Irrigation District have failed to levy any assessment for the purpose of satisfying the judgment in this case, and have failed to take any other action looking toward payment thereof, and there having been served upon you certified copies of the judgment in this case, demand is made that you forthwith levy assessments as provided in said judgment for the purpose of paying the same, and you are further advised that if you continue to fail to make such levy, application will be made to the Federal Court for an order citing you for contempt of court for failing to carry out the provisions of said judgment.

You are further advised that not only does the judgment require you to do these things, but the laws of the State of California require you to do so, and put you upon notice of the failure of the irrigation district to levy the assessments provided in the statute, and that it will be the position of the plaintiff in this case, that you have knowledge of the failure of the El Camino Irrigation District and its Officers to levy any assessments for bond interest or principal over the past ten years.

Dated: January 2, 1946.

W. COBURN COOK,

Attorney for Plaintiff. [25]

State of California,
County of Sacramento—ss.

John P. Ryan, being first duly sworn says: that he is a citizen of the State of California and over the age of 21 years and not a party to the above entitled action; that on or about the 3rd day of January, 1947, he served the within Notice upon the Board of Supervisors of Tehama County, California by delivering to and leaving with A. E. Davis, Clerk of the Board, B. A. Osborn, Chairman, W. E. Rockford, Assessor and Tax Collector (served Jan. 4, 1947) a copy of said notice, personally in the County of Tehama.

JOHN P. RYAN.

Subscribed and sworn to before me this 18th day of August, 1947.

[Seal] M. B. BROWN,
Deputy Clerk, U. S. District Court, Northern Dis-
trict of California.

[Endorsed]: Filed Aug. 18, 1947. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California,
County of Tehama—ss.

J. N. Frome, being duly sworn, says:

That he is the Sheriff of the County of Tehama, State of California, and as such Sheriff received the Order to Show cause herein on the 2nd day of August, 1947, and personally served the same on the 4th day of August, 1947 upon each of the following, to wit: B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes, Walter Bunting, members of Tehama County Board of Supervisors, by delivering to and leaving with each of the within named parties personally in the County of Tehama, State of California, a certified copy of said Order to Show Cause and a copy of Affidavit therein referred to.

J. N. FROME.

Subscribed and sworn to before me this 7th day of August, 1947.

[Seal]

IRMA STALL,

Notary Public.

[Endorsed]: Filed Aug. 18, 1947. [27]

In the District Court of the United States, Northern
District of California, Northern Division

No. 5082 Civ.

PUEBLO TRADING CO., a corporation,
Plaintiff,

vs.

EL CAMINO IRRIGATION DISTRICT, a public
corporation,
Defendant.

OPINION AND ORDER

Plaintiff recovered a judgment against defendant by default for the payment of a sum of money due and owing on outstanding bonds of defendant irrigation district. The judgment provided that the money be obtained by the defendant through assessment, and that in the event that defendant's board of directors failed to act that the Board of Supervisors of Tehama County should make provision for the payment of this sum in the manner provided by Division 11 of the Water Code of the State of California. There being no activity by defendant or the Board of Supervisors, an order to show cause why the Board of Supervisors of Tehama County should not be held in contempt of the order of this court was issued herein. The Board of Supervisors demurred to the affidavit for order to show cause on the ground that the judgment goes beyond the complaint, and further that neither the county nor any part of its officers were parties

to this suit and that the plaintiff should pursue the remedies provided by Sections 25650 to 25653 of the Water Code of the State of California.

Plaintiff bases its argument in support of its theory that the Board of Supervisors were in contempt primarily upon the case of "Board of Supervisors of Riverside County vs. Thompson" 122 Fed. 860. That case is clearly distinguishable from ours. There a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the board of supervisors to make a levy sufficient to satisfy the judgment. In the second action the board of supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense.

For a board of supervisors to be in contempt of this court they would have had to have been afforded notice and an opportunity to be heard before this court would have jurisdiction to render a judgment requiring the members thereof to perform their statutory duty and for the failure to perform which the contempt is sought. Until that time they would not have been afforded their constitutional guarantee of "due process." "The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause." 12 Am. Jur. Sec. 573.

The Board of Supervisors not being parties to this action this court had no jurisdiction over them, and as there was no jurisdiction over the board at the institution of this proceeding the Board of Supervisors can not now be held [29] in contempt for failing to perform a requirement in the judgment. "Due process is not a yard stick of definite value; it has been said to be 'merely an embodiment of the English sporting idea of fair play'." *Peo vs. Tilkin* 34 C.A. 2d Supp. 743.

The contempt proceeding is dismissed.

Dated: September 23, 1947.

DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Sept. 23, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Circuit Court of Appeals for the Ninth
Circuit (Under Rule 73)

Notice Is Hereby Given that Pueblo Trading Co., a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Opinion and Order made and filed herein on September 23, 1947 and from the whole thereof.

Dated: October 28, 1947.

W. COBURN COOK,

Attorney for Appellant.

[Endorsed]: Filed Nov. 3, 1947. [31]

[Title of District Court and Cause.]

STATEMENT OF POINTS AND ASSIGN-
MENT OF ERRORS ON APPEAL

The appellant, Pueblo Trading Co., a corporation, makes the following assignment of errors which it avers occurred in the determination of this proceeding and in the rendering of the Opinion and an Order appealed from, and states that the points on which it intends to rely on the appeal of this cause are the following:

1. The court erred in making and entering the order dated September 23, 1947 dismissing the contempt proceedings.

2. The court erred in purging the officers of Tehama County of contempt.

3. The court erred in holding and determining that the officers of the County of Tehama were not afforded due process.

4. The court erred in holding and determining that the officers of the County of Tehama were necessary parties to the action or should have been served with notice before entry of the judgment.

5. The court erred in permitting the officers of Tehama County to in effect nullify the judgment by means of a demurrer to the contempt proceedings, the time for appeal having expired and the time to modify or set aside the judgment having expired

and the said parties having had notice of the entry of the judgment against them.

Dated: November 7, 1947.

W. COBURN COOK,
Attorney for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Nov. 8, 1947. [33]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Appellant Pueblo Trading Co., a corporation, designates the following as those parts of the record as necessary for the consideration of the points on which appellant intends to rely on this appeal and for printing, to wit:

1. Complaint.
2. Judgment by Default.
3. Affidavit of H. R. Anderson dated Feb. 2, 1945.
4. Affidavit of W. Coburn Cook dated June 9, 1947.
5. Order to Show Cause dated July 7, 1947.
6. Notice and Demand dated January 2, 1946.
7. All proofs of service, including proofs of service dated August 7, 1947.
8. Opinion and Order dated September 23, 1947.

9. Notice of Appeal.
 10. Statement of Points and Assignment of Errors on Appeal.
 11. This Designation of Contents of Record on Appeal.
 12. Demurrer to Affidavit for Order to Show Cause and Affidavit of Edmund M. Moor.
- Dated: November 7, 1947.

W. COBURN COOK,
Attorney for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Nov. 8, 1947. [34]

CERTIFICATION OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Pueblo Trading Co., a corporation, vs. El. Camino Irrigation District, a public corporation, No. 5082, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Contents of Record on Appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the

sum of Five and 40/100 (\$5.40), and that the same has been paid to me by the attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 22nd day of November, A.D. 1947.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ F. M. LAMPERT,
Deputy Clerk.

[Endorsed]: No. 11798. United States Circuit Court of Appeals for the Ninth Circuit. Pueblo Trading Co., a corporation, Appellant, vs. El Camino Irrigation District, a public corporation; B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and Walter Bunting, Members of the Board of Supervisors of Tehama County, and W. E. Rochford, Assessor of Tehama County, California, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed November 24, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11798

PUEBLO TRADING CO., a corporation,
Appellant,
vs.

EL CAMINO IRRIGATION DISTRICT,
a public corporation,
Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

The appellant adopts as the points on appeal on which it intends to rely, the Statement of Points and Assignment of Errors on Appeal designated and filed in the United States District Court

Dated: November 25, 1947.

/s/ W. COBURN COOK,
Attorney for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Nov. 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL AND FOR PRINTING

The appellant designates as those parts of the record as necessary for the consideration of the points upon which the appellant intends to rely in this appeal and for printing the entire record on appeal as designated in the United States Circuit Court of Appeal.

Dated: November 25, 1947.

/s/ W. COBURN COOK,
Attorney for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Nov. 28, 1947.

No. 11,798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PUEBLO TRADING Co. (a corporation),
Appellant,

vs.

EL CAMINO IRRIGATION DISTRICT (a
public corporation); B. A. OSBORN,
S. E. AYER, J. P. BURTON, WALTER
MAYES and WALTER BUNTING, Mem-
bers of the Board of Supervisors of
Tehama County, and W. E. ROCH-
FORD, Assessor of Tehama County,
California,
Appellees.

BRIEF FOR APPELLANT.

W. COBURN COOK,

Berg Building, Turlock, California,

Attorney for Appellant.

FILED
1948

Subject Index

| | Page |
|---|------|
| Jurisdictional facts and pleadings | 1 |
| Statement of the case | 3 |
| Summary of argument | 9 |
| Argument | 10 |
| First Point: The defense that it was necessary for the appellant to seek the remedy provided in Sections 26550-26553 inclusive of the Water Code of the State of California was not sustained | 10 |
| Second Point: California law as interpreted in the case of El Camino Land Corporation v. Board of Supervisors of Tehama County, 43 Cal. App. (2d) 351, 110 P. (2d) 1076, does not support the order of the District Court in dismissing the proceedings | 13 |
| Third Point: The defense that the judgments were served on the supervisors too late to make a levy was not sustained | 15 |
| Fourth Point: The judgment requiring the supervisors and assessor to levy assessment to satisfy the judgment was in the nature of execution of the judgment, and the officers involved were not necessary parties to the action, merely because the satisfaction of the judgment might require their action | 16 |
| Fifth Point: The court below erred in construing the decision in the case of Riverside County v. Thompson, 122 Fed. 860 | 21 |
| Sixth Point: The appellees were afforded due process..... | 27 |
| Seventh Point: The court erred in not regarding its order to show cause as process under Rule 81(b) of Federal Rules of Civil Procedure | 30 |
| Conclusion | 32 |

Table of Authorities Cited

| Cases | Pages |
|--|-------------------------------|
| Board of County Commissioners of Labette Co., Kansas v. U. S., 112 U. S. 217, 5 S. Ct. 108..... | 18 |
| Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860 | 8, 10, 16, 20, 21, 25, 29, 32 |
| Chanute City v. Trader, 132 U. S. 210, 33 L. Ed. 345, 10 S. Ct. 67 | 25 |
| El Camino Irrigation District v. El Camino Land Corp., 12 Cal. (2d) 378, 85 Pac. (2d) 123..... | 16, 30, 32 |
| El Camino Land Corporation v. Board of Supervisors of Tehama County, 43 C. A. (2d) 351..... | 7, 13, 14 |
| Knox County v. Aspinwall, 24 How. 376, 16 L. Ed. 735.... | 25 |
| Labette County Commrs. v. U. S., 112 U. S. 217, 28 L. Ed. 698, 5 S. Ct. 108 | 25 |
| Levine v. Farley, 107 Fed. (2d) 186 | 31 |
| Mayor v. Lord, 76 U. S. 409, 19 L. Ed. 704..... | 25 |
| Morgenthau v. Barrett, 108 Fed. (2d) 481..... | 31 |
| Perris Irrigation District v. Thompson, 116 Fed. 832..... | 16 |
| Riggs v. Johnson County, 6 Wall. 166 | 19 |
| Selby v. Oakdale Irrigation District, 140 C. A. 171, 35 Pac. (2d) 125 | 11 |
| State of Arkansas v. St. Louis-San Francisco Ry. Co., 269 U. S. 172, 46 S. Ct. 66 | 20 |
| Stewart v. Salamon, 97 U. S. 361 | 19 |
| Thompson v. Perris Irrigation District, 116 Fed. 769..... | 16 |
| United States v. Johnson County, 6 Wall. 193, 18 L. Ed. 775 | 25 |
| United States v. Knox County, 122 U. S. 306, 30 L. Ed. 1152, 7 S. Ct. 1171 | 18, 25 |
| United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 227.. | 25 |
| Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781..... | 25 |

| Statutes | Pages |
|---|---------------|
| Judicial Code as amended, Section 128(a), 28 U.S.C.A. 225(a) | 1 |
| Stat. Cal. 1887, p. 29 (116 Fed. 832, 3) | 17 |
| Stats. 1897, 254 | 3, 17 |
| Water Code of California, Division 11 | 3, 4 |
| Section 26500 | 6, 15, 17, 28 |
| Sections 26500 to 26504 | 15 |
| Section 26501 | 15, 28 |
| Section 26502 | 15 |
| Sections 26,550 to 26,553 | 7, 10 |
| Section 25650 | 17, 28 |
| Section 25652 | 17, 28 |

Rules

Federal Rules of Civil Procedure:

| | |
|-------------------|----------------|
| Rule 60 | 14 |
| Rule 69 | 18, 29 |
| Rule 73 | 2 |
| Rule 81 (b) | 18, 28, 30, 31 |

No. 11,798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PUEBLO TRADING Co. (a corporation),
Appellant,

vs.

EL CAMINO IRRIGATION DISTRICT (a
public corporation); B. A. OSBORN,
S. E. AYER, J. P. BURTON, WALTER
MAYES and WALTER BUNTING, Mem-
bers of the Board of Supervisors of
Tehama County, and W. E. ROCH-
FORD, Assessor of Tehama County,
California,
Appellees.

BRIEF FOR APPELLANT.

JURISDICTIONAL FACTS AND PLEADINGS.

This is an appeal from an order made by the District Court dismissing contempt proceedings in a civil case and holding that the Court did not have jurisdiction of certain of the appellees herein and that they had not been afforded due process.

The jurisdiction of this Court in this appeal is under Section 128(a) Judicial Code as amended, 28

U.S.C.A. 225(a), and Rule 73, Federal Rules of Civil Procedure. The appellant herein, Pueblo Trading Co., was the plaintiff below and obtained a judgment for a sum of money upon bonds of the El Camino Irrigation District, a public corporation. This being a case where a writ of execution could not issue, the judgment provided for payment by ordinary tax process. The officers whose duty it was to carry out the tax process had not been made parties to the action. The judgment provided that they should satisfy the judgment and the Court retained jurisdiction of the cause for that purpose. After notification to them of the requirements of the judgment and their failure to carry out the Court's order they were cited for contempt (R. 12-13), the order to show cause further providing that the parties show cause why "such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein." The appellees appeared by demurrer (R. 18) and the Court after a hearing issued its order dismissing the proceedings. (R. 27.) This order from which the appeal was taken was dated September 23, 1947, and filed September 23, 1947. (R. 29.) Notice of appeal was dated October 28, 1947 and filed November 3, 1947 (R. 29), and the appeal was filed in this Court on November 24, 1947. (R. 33.)

The amount in dispute is the sum of \$53,000 (R. 7), exclusive of interest.

STATEMENT OF THE CASE.

Pueblo Trading Co., a Nevada corporation, brought suit against the El Camino Irrigation District, located in Tehama County, California in January, 1945, and in its complaint stated that the El Camino Irrigation District is a public corporation, an irrigation district, organized and existing under the provisions by virtue of "the California Irrigation District Act" of the State of California, being Stats. 1897, page 254 as amended.¹ The irrigation district had previously sold its general obligation coupon bonds in the principal amount of \$430,000 or thereabouts, bearing interest at six per cent per annum, and the plaintiff was the owner of \$53,000 principal amount of these bonds, together with certain interest coupons and interests appurtenant thereto. The appellant alleged that these bonds were wholly unpaid and prayed for judgment against the defendant for the sum of \$53,000 principal, together with interest, and for such other relief as might be proper. (R. 2-5.) The complaint was served upon the El Camino Irrigation District on January 10, 1945 (R. 6), which defaulted in the action, whereupon a judgment was entered by the Court on February 13, 1945. (R. 8.) This judgment awarded plaintiff the sum of \$53,000 principal, \$18,-181.65 interest and \$19.00 costs, together with future interest (R. 7) and the judgment contained the further provision: "It is further ordered that the defendant El Camino Irrigation District make provision

¹This act has now been incorporated into the Water Code, where it is Division 11.

for the payment of this judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided under the provisions of Division 11 of the Water Code of the State of California, and that upon the failure or refusal of the defendant and its officers to make such provision, that the Board of Supervisors and other officers of the County of Tehama, State of California, make provision for the payment of this judgment by levying and collecting assessments against the lands in said district in the manner provided by the said Division 11 of the Water Code of the State of California, and that for that purpose this Court retain jurisdiction of the cause and that the plaintiff may apply to the Court for such further relief as may be appropriate to obtain satisfaction of the judgment.” (R. 7.)

This provision is at the center of the controversy.

Copies of the judgment were served upon the directors of the El Camino Irrigation District August 28, 1946 and September 27, 1946. (R. 9, 11.)

Certified copies of the judgment were also served upon the District Attorney of Tehama County and the Assessor of Tehama County (W. E. Rochford, appellee), on September 5, 1946; also upon the Treasurer of Tehama County on September 12, 1946. (R. 10.)

Service of the judgment was also made upon the members of the Board of Supervisors of Tehama County, appellees herein, that is, upon board mem-

bers B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and upon G. L. Childs, then board member on August 28, 1946. (R. 11.)

A written notice and demand was also made advising the Board of Supervisors of Tehama County of the failure of the irrigation district to levy assessments for the purpose of satisfying the judgment and calling their attention to the fact that certified copies of the judgment had been served upon the Board of Supervisors, and demanding that the board forthwith levy an assessment as provided in the judgment for the purpose of paying the same and advising the board that if the board should continue to fail to make such levy, application would be made to the Federal Court for an order citing for contempt. This notice further advised the board that not only did the judgment require them to do these things but that the laws of California also required them to do so and called the attention of the Board of Supervisors to the fact that the El Camino Irrigation District and its officers had failed for more than 10 years to levy any assessment whatever for bond interest or principal. This notice was dated January 2, 1946 (obvious error, should have been 1947), and the notice was served upon the Board of Supervisors by serving the clerk, the chairman of the board and the majority of the board members and the county assessor and tax collector on January 3 and 4, 1947. (R. 15, 24, 25.)

It is contended that the Board of Supervisors and the assessor, the appellees herein, had due and proper

notice of the judgment and of the requirements placed upon them, and that due process was afforded them.

The pertinent provision of the Water Code of the State of California requiring the Board of Supervisors to make the levy in question is Section 26,500 of the Water Code, which provides as follows:

“If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.”

The matter of the failure of the Board of Supervisors to carry out the provisions of the judgment and of the statute was called to the attention of the Court by affidavit filed in the case July 7, 1947 (R. 16), whereupon the Court on July 7, 1947, issued its order to show cause directed to the Board of Supervisors and the assessor, appellees herein, to show cause on August 18, 1947, why they should not be punished for contempt for disobedience of the judgment made February 13, 1947, and why such further order in the premises should not be made “as will insure the levy and collection of assessments for the satisfaction of the judgment herein.” (R. 12.)

This order was served upon the parties August 13, 1947. (R. 13.)

The appellees appeared by demurrer to the affidavit for the order to show cause (R. 18) and contended (1): That the judgment went beyond the complaint;

(2): That the appellees were not made parties to the proceedings nor brought before the Court by any process; (3): That the appellant had not pursued the remedies provided by Sections 26,550 to 26,553 of the Water Code of the State of California.²

Appearance was also made by affidavit in opposition to the order to show cause in which the District Attorney of the county relied upon the demurrer and the advice of the Attorney General of the State of California set forth at R. 21-23.

By the affidavit the appellees also made the defense that it would be inequitable to levy an assessment for the appellant's judgment "when as a matter of fact there are other outstanding bonds and interest on bonds in a far greater sum than is involved in this suit."

The defense was also made in this pleading that the California Court had held in the case of *El Camino Land Corporation v. Board of Supervisors of Tehama County*, 43 C. A. (2d) 351, that "writs of mandate were denied solely because to have enacted the assessments would have produced economic chaos and would have been inequitable." (R. 19-20.)

The opinion of the Attorney General addressed to the county tax collector (R. 21), was dated September 23, 1946, and showed that the matter of the assessment had been discussed and he advised the officials that *because of the fact that they were not notified of the judgment until after they had fixed*

²These sections are set forth in Appendix A attached hereto.

their tax rate the county would not be guilty of contempt (R. 22), but urged the Board of Supervisors and the officials to take the matter up with the board of directors of the irrigation district and try to get them to work out a solution to their financial difficulties “because it is quite possible that, in proper proceedings, the county could be compelled to levy and collect an assessment to discharge such obligations.” (R. 23.)

The matter came on for hearing before the Court, which made its order dismissing the proceedings entirely on September 23, 1947. (R. 29.) The Court in this order held that the case of *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860, is distinguishable from the case at bar, saying: “There a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the Board of Supervisors to make a levy sufficient to satisfy the judgment. In the second action the Board of Supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense.” (R. 28.)

We will show in our argument that there is a misunderstanding as to what occurred in the *Thompson* case, and that the case is not distinguishable.

The Court below held that to hold the officers for contempt they would have to be afforded notice and an opportunity to be heard “before this Court would

have jurisdiction to render a judgment requiring members thereof to perform their statutory duty and for the failure to perform which the contempt is sought. Until that time they would not have been afforded their constitutional guarantee of 'due process' " and the Court held that "the Board of Supervisors not being parties to this action, this Court had no jurisdiction over them, * * *." (R. 28, 29.) The proceedings were thereupon dismissed.

SUMMARY OF ARGUMENT.

Writs of mandamus have been abolished in federal procedure. There is no such thing as bringing an action for a writ of mandamus. Under the federal rules where a judgment is not to be satisfied by execution, the judgment should provide the method by which it is to be satisfied. The collection of a judgment by whatever method is merely process in the nature of execution. The order requiring the supervisors to make the assessment was no different in character than a writ of execution would have been requiring them to make payment. It is no more necessary to make the officers who have a duty to perform parties to an action against a public corporation than it is necessary to make the marshal or any other person who has a duty to perform a party to the action. Furthermore, these officers were all afforded due notice and process. Months and even years passed before they were brought in before the Court below. They were there-

for guilty of contempt. Furthermore, the *Thompson* case is not distinguishable as we will show in our subsequent analysis. The supervisors in that case were not made parties to the action by the plaintiff and the case holds that they were not necessary parties. Furthermore, the Court below erred because the order to show cause provided that the Court would proceed with whatever was proper to effect a levy of the tax. If the Court was properly satisfied that the parties were not guilty of contempt, it should have made an order then and there requiring the levy of the assessment.

Arguments are made under First Point, Second Point and Third Point because the additional defenses there discussed were made. They are not included in this summary.

ARGUMENT.

FIRST POINT: THE DEFENSE THAT IT WAS NECESSARY FOR THE APPELLANT TO SEEK THE REMEDY PROVIDED IN SECTIONS 26550-26553 INCLUSIVE OF THE WATER CODE OF THE STATE OF CALIFORNIA WAS NOT SUSTAINED.

The provisions are set forth in full in Appendix A hereunto annexed.

The sections quoted impose upon the District Attorney the duty of notifying the Board of Supervisors of the failure of the board of directors of the irrigation district to levy the assessments, and if the Board of Supervisors fail, then to take action to compel performance. If the District Attorney fails to carry

this out, it becomes the duty of the Attorney General of the State to compel the levy.

It seems a strange thing that the officers of the County of Tehama should plead their own negligence and neglect as the reason for not performing the order of the Court. After all, what plaintiff seeks is performance of the duty which the District Attorney and the Attorney General should have enforced.

In the case of *Selby v. Oakdale Irrigation District*, 140 C. A. 171, 35 Pac. (2d) 125, the intervener raised this very point. The case involved an application for a writ of mandamus to require the treasurer of the district to pay bond interest and principal due. Counsel for the intervener contended that petitioner had failed to pursue the proper remedy for the enforcement of his right and said:

“Your petitioner could

1. Have made a demand on the Board of Directors for a levy of a tax to provide for the payment of his bonds and coupons;

2. In the event that the Board of Directors should refuse to levy a tax as requested, demand that the District Attorney of the county in which the District is located request the Board of Supervisors of that county to provide for the tax (Irrigation District Act, Section 39c);

3. In the event that the District Attorney and the Board of Supervisors should fail to perform their duties as provided by law, request the Attorney General of the State of California to take such measures as may be necessary to enforce the

performance of the duties relating to the levying and collection of assessments (Irrigation District Act, Section 39c) ;

4. And, lastly, in the event that any of the aforementioned remedies should have proved ineffectual, your petitioner had the right to apply to an appropriate court of law, seeking a writ of mandate to require the respective officers and officials of the Oakdale Irrigation District to perform the duties especially enjoined upon them by law."

The District Court of Appeal answered this contention in the following language (page 128) :

"A reading of the record discloses that the board of directors of the Oakdale Irrigation District, the board of supervisors of the county of Stanislaus, in which said district is situated, and also that the district attorney of said county, have failed and neglected to comply with the provisions of Section 39 (amended by St. 1931, p. 122) ; sections 39b and 39c (St. 1917, pp. 765, 766), of the California Irrigation District Act, and that the treasurer of Stanislaus County has failed and refused to comply with the provisions of section 52 of said act. In these particulars it is urged by the interveners that the petitioner should have instituted mandamus proceedings against the respective officers to compel performance of their statutory duties, and especially should have prosecuted an action against the directors of the district to compel them to levy a tax for the benefit of holders of unrefunded bonds.

"We may admit that the petitioner might have maintained such a proceeding against the board

of directors immediately after September 27, 1933. This admission, however, does not lead to the conclusion that any unauthorized limitation of the purposes of the tax levy, or any unauthorized attempted preference is thereby conceded to be valid, or that such portion of the attempted levy is legally any part or parcel thereof."

The defense was accordingly overruled and the writ sought by Selby was granted.

SECOND POINT: CALIFORNIA LAW AS INTERPRETED IN THE CASE OF EL CAMINO LAND CORPORATION v. BOARD OF SUPERVISORS OF TEHAMA COUNTY, 43 CAL. APP. (2d) 351, 110 P. (2d) 1076, DOES NOT SUPPORT THE ORDER OF THE DISTRICT COURT IN DISMISSING THE PROCEEDINGS.

Appellees relied upon the case of *El Camino Land Corporation v. Board of Supervisors of Tehama County*, 43 Cal. App. (2d) 351, 110 Pac. (2d) 1076, as a ground for refusing a levy of an assessment for the judgment in this case.

This case merely held that the issuance of a writ of mandamus is discretionary with the Court. The Court said (page 1079):

"We are of the opinion that under the law as we have stated it, the facts found by the court were sufficient to invoke its legal discretion in favor of denying the writ."

In the instant case the Court did not exercise its discretion in such manner in entering the judgment and furthermore it is not certain that it could have

so done. This is a matter of procedural law. At any rate the defendant appellee had ample opportunity to appear before the Court and plead its cause. This it did not do.

Counsel for the appellees referred in their response to the order to show cause to a letter from the then Attorney General dated September 23, 1946 in which the former Attorney General gave it as his opinion that the judgment in this case went beyond the prayer and that because the judgment was not called to the attention of the county until after fixing the tax rate the county could not in any way be held guilty of contempt. The attorney general also cited the *El Camino* case.

It might be pointed out also that the Attorney General recommended to the county officials that they urge the board of directors of the irrigation district to try to work out a solution of its financial difficulties. It is obvious that the district has made no attempt to do this and it has levied no assessments of any kind for bonds for over ten years. However, that matter is outside the purview of the present proceeding. The *El Camino* case, also referred to by the Attorney General, cannot be considered after the judgment requiring the levy has become final and the period fixed in Rule 60 of the Federal Rules of Civil Procedure has expired.

THIRD POINT: THE DEFENSE THAT THE JUDGMENTS WERE SERVED ON THE SUPERVISORS TOO LATE TO MAKE A LEVY WAS NOT SUSTAINED.

As to the Attorney General's claim that it was too late to make the levy when the judgments were served because the county levy had already been made, the facts as shown by the record are that the judgment was entered in this case on February 13, 1946; that certified copies of the judgment were served upon all the parties to this proceeding in September, 1946; that a further notice was served upon the supervisors and officers of the county in January, 1947. If it was too late to include these assessments when the taxes were levied by the county in 1946, it was not too late to do so in 1947. The county made no offer or promise to levy in 1947 but still resisted the order of the Court requiring the levy of an assessment.

Furthermore, Sections 26500 to 26504³ of the Water Code do not contemplate the Board of Supervisors shall levy the assessment at the same time or in the same manner as they levy the county assessment. Section 26500 provides that the supervisors shall levy the assessment "in the same manner and with the same effect as if they were performed by the board". Section 26501 provides that the applicable part of the equalized county assessment roll shall be the basis of the assessment. This therefore contemplates that the assessment should be made after the county has made its own assessment and equalized its rolls, for in Section 26502 it says that if any land subject to assess-

³See Appendix A.

ment for the purpose of the district does not appear upon the county assessment roll used as the basis for the district, the board shall be forthwith required to meet and equalize the assessment made for the irrigation district in a separate proceeding.

FOURTH POINT: THE JUDGMENT REQUIRING THE SUPERVISORS AND ASSESSOR TO LEVY ASSESSMENT TO SATISFY THE JUDGMENT WAS IN THE NATURE OF EXECUTION OF THE JUDGMENT, AND THE OFFICERS INVOLVED WERE NOT NECESSARY PARTIES TO THE ACTION, MERELY BECAUSE THE SATISFACTION OF THE JUDGMENT MIGHT REQUIRE THEIR ACTION.

No writ of execution can be levied against the property of an irrigation district. (*El Camino Irrigation District v. El Camino Land Corp.*, 12 Cal. (2d) 378, 85 Pac. (2d) 123.

In federal Courts the former practice was to obtain a judgment against the district and then to obtain a writ of mandate to compel levy of assessment. Under the former practice these writs of mandate were obtained in supplemental proceedings. (*Thompson v. Perris Irrigation District*, 116 Fed. 769; *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860.⁴)

As stated in those two decisions, mandamus is a proper remedy for collecting a judgment against an irrigation district in California.

⁴Another case in this litigation is *Perris Irrigation District v. Thompson*, 116 Fed. 832.

The writ was not a new suit but merely process essential to jurisdiction and substituted for execution to enforce the judgment. Furthermore, it was held in Riverside County case that the judgment determined all questions that might have been litigated and also all questions that were actually litigated, and determined those matters for the parties, not only before the Court, but for all parties who might thereafter under the law be called upon in a proceeding in the nature of an execution to enforce the judgment therein obtained.

The basis for the issuance of the writ of mandate was California Statutes 1897, page 254 (Sec. 39 of the California Irrigation District Act), now Sections 25650 and 25652 of the Water Code, and which provides that the Board of Directors of the irrigation district shall "levy an annual assessment upon the lands within the district in an amount sufficient to raise * * * all obligations of the district which have been reduced to judgment".⁵

Section 26500 of this Code provides that if the Board of Directors neglect or refuse to make the assessment "the board of supervisors of the office county shall * * * perform the duties of the board of the district * * *"

Thus the officers of the county are in effect made officers of the irrigation district to carry out the tax process. (See Appendix A.)

⁵The bonds appear to have been issued under the former Wright Act, Stat. Cal. 1887, p. 29 (116 Fed. 832, 3).

Now the Federal Rules of Civil Procedure, Rule 81 (b) provide for the abolition of writs of mandate and provide that the relief of a writ of mandate may now be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules. Section 69 of the Rules provides:

“Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.”

It therefore appears that unless the Court had directed otherwise in the judgment, the plaintiff would have been limited to a writ of execution, and insomuch as writs of mandate have been abolished, it would therefore appear that the Court took the proper course in providing *otherwise* in the judgment, and this it did in providing for the collection of the judgment by the method provided by the Water Code of the State of California, namely, levy of assessment.

In *Board of County Commissioners of Labette Co., Kansas v. U. S.*, 112 U. S. 217, 5 S. Ct. 108, it is held that mandamus can be exercised against persons who are not parties to the judgment sought to be enforced. See also *U. S. v. County Court of Knox Co.*, 122 U. S. 306, 7 S. Ct. 1171, where the Court affirmed the decision in the above case saying:

“The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity as well as the county itself, * * *”

This last case holds that the Court has jurisdiction to enforce a judgment entered by the Court by man-

damus against persons who are not parties to the judgment sought to be enforced.

In the case of *Stewart v. Salamon*, 97 U. S. 361:

“This is an appeal from a decree entered upon our mandate. No complaint is made as to its form and it seems to be in all respects according to our directions. *The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do.* The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate. The appeal is dismissed with costs”.

It was contended that the proceeding for the writ was entirely new and independent of the action upon which the judgment was obtained. The case of *Riggs v. Johnson County*, 6 Wall. 166 disposes of this point:

“The writ of mandamus in the case like the present one is a writ in aid of jurisdiction, which has previously attached, and in such case it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract. * * * When so employed it is neither a prerogative writ nor a new suit in

the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same.”

In *State of Arkansas v. St. Louis-San Francisco Ry. Co.*, 269 U. S. 172, 46 S. Ct. 66, it is held where a judgment was obtained against a county, the district Court had jurisdiction to compel the assessing officers of the county to levy a tax for the purpose of securing satisfaction of this judgment.

The leading case is one in this circuit, *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860.⁶ In this case a judgment had been obtained against the irrigation district in question and the Court held that this judgment was conclusive as to all matters that might have been litigated in the action, so far as the board of supervisors of the county was concerned, and that the board might be compelled in supplemental proceedings to make the levy by mandamus. The Court, after citing the California statutes, said:

“By this statute it is made the plain duty of the board of supervisors to make the levy required by the act in case of the neglect or refusal of the board of directors to cause such assessment and levy to be made. But it is objected that the board of supervisors and the interveners were not parties to the former action, and were, therefore,

⁶See full discussion of this case under separate point, next following.

not precluded by the judgment, and that they now have the right to make herein all the defenses which could have been made to the original action. We cannot assent to this contention. *The judgment in the former action established the right of the defendant in error against the irrigation district. All the necessary parties to that action were before the court, and there was no defect of parties defendant.* The present proceeding is not a new action to establish the rights of the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce the judgment already rendered. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment, as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris Irrigation District can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action.

“The point is made that no notice or demand was given the board of supervisors before filing the petition for the writ of mandamus. The statute does not require such notice. The petition was notice.” (Emphasis ours.)

FIFTH POINT: THE COURT BELOW ERRED IN CONSTRUING THE DECISION IN THE CASE OF RIVERSIDE COUNTY v. THOMPSON, 122 FED. 860.

The District Judge refers to the case of *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860 and says:

“That case is clearly distinguishable from ours. There a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the board of supervisors to make a levy sufficient to satisfy the judgment. In the second action the board of supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense.” (R. 28.)

We have examined the record on appeal in this case in the files of the Ninth Circuit Court of Appeals, where the case is numbered 912. We think there is some misunderstanding of the *Thompson* case. There were not two actions but only one. The members of the Board of Supervisors were not made parties to any suit. They asked to intervene. What really happened was that a judgment was obtained against the Perris Irrigation District on the bonds in question. At that time a district Court could issue a writ of mandate. So the plaintiff Thompson asked the Court to issue a writ of mandate and an alternative writ was issued September 18, 1901. (R. 79, case No. 912 in this Court.) Thompson in his brief in this case goes to considerable length to emphasize the fact that there is only one action and not two actions. He emphasizes

that in the lower Court, where all papers bore the number 849. The attorney for Thompson, whom we will refer to as the plaintiff, was Christopher C. Wright. C. B. Bullock was one of the supervisors. Perris Irrigation District was the district involved. Probably the difference in names of the parties has brought confusion not only to the Court when the original case was heard but to the Court below in the instant case. At page 43 of Thompson's brief he contends that the interveners, that is, Bullock and the other parties who intervened, were not proper parties to the proceeding. We think the decision in the case upheld this contention. The defense raised by the Board of Supervisors in their answer was stricken by the lower Court and the judgment of that Court was affirmed. **Consequently it would appear that the Thompson case determines that the Board of Supervisors are not proper parties and did not have the right to litigate the matter after a judgment has been entered against an irrigation district.**

R. H. Thompson brought his action against the Perris Irrigation District. An amended complaint was filed. (R. 10, case No. 912.) The plaintiff asked for a judgment against the district in the amount of \$6405 with interest and costs upon certain bonds and coupons which were alleged to have been issued by the district. The case was heard before a jury, and upon instructions of the judge to the jury judgment for \$8306.75 was entered March 28, 1901. (R. 25, case No. 912.) The case was then appealed to the Ninth Circuit Court of Appeals and judgment was affirmed May 5, 1902. (R. 90, 91, case No. 912.) Thompson

filed a petition for writ of mandate to compel the supervisors to levy an assessment in the same action. (R. 62, case No. 912.) (See also R. 74.) This petition showed that some kind of a request had been made to the Board of Supervisors to levy the assessment. (R. 67, case No. 912.) In our case like request was made of the Board of Supervisors. The supervisors refused to make the levy. (R. 205, case No. 912.) Whether the petition for mandate was served upon the Board of Supervisors does not appear, but at any rate the defendant Perris Irrigation District made a motion to quash the alternative writ and filed a demurrer to the petition, and a demurrer was also filed by the Board of Supervisors to the petition on or about December 16, 1901. (R. 83, 86, 87, 90, case No. 912.) (Mandate was issued May 21, 1902.)

The motion to quash stated amongst other things: "There is a misjoinder of parties to said petition in that petition for an order to show cause and for a writ of mandate should have been against the Board of Directors of the Perris Irrigation District, defendant in said action, and not against the Board of Supervisors of the County of Riverside, State of California." And upon the further ground that "The Board of Supervisors of Riverside County mentioned in said petition, and to whom the order to show cause herein is directed, is not, nor is any of its members, made a party defendant to said action, or to said petition for a writ of mandate." (R. 84, case No. 912.)

That is exactly the situation in the instant case where an application for an order to show cause was

made by plaintiff Pueblo Trading Co. and an order to show cause issued. (R. 12, 14, 16, case No. 11798.) The application in the instant case prayed for an order to be issued, citing the supervisors to show cause why they should not be punished for contempt, and that such further order be made as would insure provision for payment of the judgment by levy and collection of taxes and assessments on the lands. (R. 15.) The judge below in the instant case in his order dismissed the entire proceeding and granted no relief. (R. 27.)

An order was made in the *Thompson* case denying the motion to quash the mandate on June 11, 1902. (R. 94, case No. 912.) The judge's opinion on this order is quite significant. The judge said, referring to the writ of mandate, "When so employed, the writ is not a new suit but simply a process essential to jurisdiction, and a substitute for execution to enforce the judgment", citing *United States v. Johnson County*, 6 Wall. 193, 18 L. Ed. 775 and *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781. (R. 95.)

Knox County v. Aspinwall, 24 Howard 376, 16 L. Ed. 735;

Mayor v. Lord, 76 U. S. 409, 19 L. Ed. 704;

United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 227;

United States v. Knox County, 122 U. S. 306, 30 L. Ed. 1152, 7 S. Ct. 1171;

Chanute City v. Trader, 132 U. S. 210, 33 L. Ed. 345, 10 S. Ct. 67;

Labette County Commrs. v. U. S., 112 U. S. 217, 28 L. Ed. 698, 5 S. Ct. 108.

Subsequently the supervisors were permitted to intervene and they filed an answer (R. 124, case No. 912); but the peremptory writ was granted (R. 160, case No. 912), and the judge struck from the answer all the substantial defenses which had been raised. (R. 174, 194, 215, 216, case No. 912.)

On appeal the supervisors contended: "The Board of Supervisors was not a party to the original action to recover on the bonds, nor were the members of the board of directors of that district. There is no allegation in the petition that any notice was given to the board of directors of the Perris Irrigation District of the recovery of any such judgment,". This was urged as a reason for reversal. It was also contended (page 18 of their brief) that the Court erred in striking out all that part of the answer showing that the district was never legally organized and other matter. The supervisors contended that the Court had had no jurisdiction to issue the writ prayed for. (R. 22, case No. 912.) Their conclusion was summed up at page 42 in the following language:

"We respectfully submit, therefore, that there is no pleading and no proof warranting the issuance of the peremptory writ in this case, and that by striking out the portions of the answer of the intervenors referred to, they were denied their right to make proof upon material and vital questions affecting their property interests, and that therefore the judgment of the court below should be reversed." (Brief, page 42.)

The motion to quash and demurrer were disallowed by the Court. (116 Fed. Rep. 770.) Thomp-

son contended that the Board of Supervisors had no right to contest the proceedings. (Brief, page 52.) He contended that the only facts which it was permissible in this proceeding to have shown were such facts as may have occurred subsequently to the affirmation of the case by the Circuit Court of Appeals.

Thompson referred to pages 62, 74, 77, 79, 83, 86, 87, 92, 94, 97, 98, 119, 154, 162 and 168 of the transcript to show that the proceeding is all one proceeding and it was not until Bullock and others intervened that the form of the pleading as to its title was changed, referring to transcript pages 123, 153, 160, 174 and 195. He points out that at no time was the Board of Supervisors designated as a party to the proceeding until the petition for writ of error to the Court of Appeals was filed, and states that "thereupon counsel for plaintiffs in error took the liberty, without authority of law, or leave of Court, to designate the Board of Supervisors as a party. See Transcript, page 208.

It conclusively appears that there was no separate action against the Board of Supervisors.

**SIXTH POINT: THE APPELLEES WERE AFFORDED
DUE PROCESS.**

It goes without saying, of course, that there is no lack of process insofar as El Camino Irrigation District is concerned.

Now the laws relating to irrigation districts impose upon certain officers certain duties. The officers upon whom duties are imposed are of course in the first instance the officers of the district itself and the board of directors is required by statute to levy assessments to satisfy not only its obligations but its bonds and the judgments against it as well.⁷ Sections 26,500 and 26,501 of the Water Code also in effect create other officers of the district or imposes upon certain public officers certain duties in relation to the irrigation district. (See Appendix A.) By these provisions of the Water Code the Board of Supervisors and assessor in effect become officers of the irrigation district and are required to satisfy the liabilities based upon bonds and other contracts and the liabilities created by judgments. All of this is independent of the order of the Court itself.

We have shown that Rule 81 (b) of Federal Rules of Civil Procedure provide for the abolition of writs

⁷Water Code, Section 25652, provides: "The annual assessment shall also include a levy sufficient to pay all of the following:

(d) All obligations of the district which have been reduced to judgment."

Section 25650 provides: "Each district by its board each year within 15 days after the close of its session as a board of equalization shall levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following:

(a) Interest due or that will become due on all outstanding bonds of the district and interest which the board believes will become due on district bonds authorized but not sold, all respectively before the close of the next ensuing calendar year.

(b) Principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year.

To the extent that provision is otherwise made as permitted by law for the payment of bond principal and interest, levies for principal and interest pursuant to this section need not be made.

of mandate and that Section 69 of the rules also provides and directs that the process to enforce a judgment for payment of money shall be by writ of execution unless the Court directs otherwise. Thus it appears that this could be and probably should be by the judgment itself.

We submit we have shown that even a writ of mandate is mere process in substitution for a writ of execution.

That being the case no new suits and no new procedures were necessary. The judgment coupled with the order to show cause was sufficient process to advise the appellees of the demands of the appellant to bring them into Court and give them their "day in Court". The Court's order to show cause was in the alternative so to speak and contemplated that the Court would proceed to take steps to ensure the levy of the assessment. Instead the Court abruptly dismissed the entire proceeding.

The appellees appeared and *defended*. They raised defenses which only a party could raise:

(1) That the order of assessment was not asked for in the complaint.

(2) That the plaintiff had not pursued other available remedies.

(3) That the assessment would be inequitable.

(4) That it was too late to make the assessment when the judgments were served upon them.

They had their day in Court—one to which they were not entitled (*Thompson case*).

SEVENTH POINT: THE COURT ERRED IN NOT REGARDING ITS ORDER TO SHOW CAUSE AS PROCESS UNDER RULE 81 (b) OF FEDERAL RULES OF CIVIL PROCEDURE.

The judgment entered by the Court provided:

“It is further ordered that the defendant El Camino Irrigation District make provision for the payment of this judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided under the provisions of Division 11 of the Water Code of the State of California, and that upon the failure or refusal of the defendant and its officers to make such provision, that the Board of Supervisors and other officers of the County of Tehama, State of California, make provision for the payment of this judgment by levying and collecting assessments against the lands in said district in the manner provided by the said Division 11 of the Water Code of the State of California, and that for that purpose this Court retain jurisdiction of the cause and that the plaintiff may apply to the Court for such further relief as may be appropriate to obtain satisfaction of the judgment.” (R. 7.)

Let it be remembered that no writ of execution can be levied against the property of an irrigation district. *El Camino Irrigation District v. El Camino Land Corporation*, 12 Cal. (2d) 378, 85 Pac. (2d) 123.

The Court itself had made an order providing that the Court would consider an appropriate order for the levy of an assessment, for the order to show cause was issued to show why “such further order in the premises should not be made as will insure the levy and

collection of assessments for the satisfaction of the judgment herein.”

The Court should, if it was correct in dismissing the contempt proceedings, have construed the order to show cause as a proceeding under Rule 81 (b) of the Federal Rules of Civil Procedure and proceeded to require the levy of the assessment. This rule reads as follows:

“The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.”

The Court’s decision that it had no jurisdiction to proceed in the matter amounted to a declaration that the rule in question was unconstitutional as applied to the situation here.

Where the Court in any particular action between parties has obtained possession of property or has something between the parties which it has to carry out, it would seem that any party interested could be brought in by some form of notice without being made a party to the action and if such party has any interest in or legal objection it can raise its objection to the process.

The cases of *Morgenthau v. Barrett*, 108 Fed. (2d) 481, and *Levine v. Farley*, 107 Fed. (2d) 186, indicate that the Courts will grant some form of relief under this rule.

We urge that we have amply shown in our statement of the case above that all of the parties were

duly notified, not only of the entry of the judgment, but that demand was made for the levy of the assessment, and of course they were duly notified of the hearing on the order to show cause, and they appeared and set forth specific defenses on the grounds of equity, and the decision in the *El Camino* case, *supra*.

It would therefore appear that unless the relief sought in this case is granted the appellant will be denied the equal protection of the laws and the Courts for satisfaction and protection of its interests, that its property will be substantially taken from it without due process of law. Furthermore ample notice had been given to the appellees of the proceedings and we submit the Court should have entered an order requiring them to levy an assessment if it did not choose to hold them guilty of contempt. They had the same opportunity afforded the supervisors in the *Thompson* case to object or raise any defense even by intervention if proper. Quite obviously the purpose of the plaintiff and appellant is not to punish officials but to secure satisfaction of the judgment.

CONCLUSION.

It is respectfully submitted that the Court erred in dismissing the proceedings. In the first place it erred in dismissing the contempt proceedings and in the second place it erred in failing to make an alternative order requiring the officers of the district to make an immediate levy to satisfy plaintiff's judgment.

We ask this Court to reverse the order dismissing the proceedings and to direct the Court to overrule the defenses and require the supervisors and officers of Tehama County to proceed forthwith with an assessment, whether or not the contempt be sustained.

Dated, Turlock, California,

February 2, 1948.

Respectfully submitted,

W. COBURN COOK,

Attorney for Appellant.

(Appendix A Follows.)

Appendix.

Appendix A

Water Code:

Section 26500. If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.

Section 26501. The applicable part of the equalized county assessment rolls of the affected counties shall be the basis of assessment for the district when its assessments are levied pursuant to this article.

Section 26502. If any land subject to assessment for the purposes of the district does not appear upon a county assessment roll used as the basis of assessment for the district, the land omitted shall be forthwith assessed by the county assessor of the county in which it is situated upon an order of the board of supervisors making the assessment, and a description of the property omitted shall be written in the roll prepared for the district assessments.

Section 26503. The board of supervisors shall meet and equalize each assessment made pursuant to this article with the assessment of other land in the district. The same notice shall be given by the board of supervisors of a meeting for the purpose of equalizing the assessment to be made as herein directed as

is provided to be given by a district secretary when a board is to meet to equalize assessments.

Section 26504. All expenses incurred in levying the assessment shall be borne by the district concerned. Unless the expenses are paid within 60 days from the time when a demand for them is made, they shall be collected by an action commenced by the district attorney of the county whose board of supervisors prepared the assessment roll.

Section 26550. The district attorney of each office county shall ascertain each year whether the duties relating to the levying and collection of assessments in districts have been performed or not, and if he learns that the board or any official of any district has neglected or refused to perform any of these duties, he shall notify the board of supervisors or the county official required to perform the duty in the circumstances.

Section 26551. Unless the board of supervisors or county official proceeds to perform the duties he has been notified to perform within 30 days after the receipt of notice, the district attorney shall take action in court to compel performance.

Section 26552. The district attorney shall give notice to other officials and take any action necessary to secure the performance in their proper sequence of subsequent duties relating to the levying and collection of assessments.

Section 26553. For the enforcement of the levying and collection of any assessment required to be levied

and collected for the payment of any debt incurred, when complaint is made to the Attorney General that the district attorney of any county has not performed any duty devolving upon him by the provisions of this article or is not proceeding with due diligence or in the proper manner in the performance of the duty, the Attorney General shall make an investigation. If he finds the charge to be true, the Attorney General shall take any action necessary to enforce the performance of the duties relating to the levying and collection of assessments.

No. 11,798

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PUEBLO TRADING CO. (a corporation),
Appellant,

vs.

EL CAMINO IRRIGATION DISTRICT (a
public corporation); B. A. OSBORN,
S. E. AYER, J. P. BURTON, WALTER
MAYES and WALTER BUNTING, Mem-
bers of the Board of Supervisors of
Tehama County, and W. E. ROCH-
FORD, Assessor of Tehama County,
California, *Appellees.*

BRIEF FOR APPELLEES.

EDMUND M. MOOR,

District Attorney of the County of Tehama,
Red Bluff, California,

*Attorney for Board of Supervisors
and County Assessor of the County
of Tehama.*

L. C. SMITH,

Redding, California,

STEPHEN W. DOWNEY,

RALPH R. MARTIG,

DOWNEY, BRAND, SEYMOUR & ROHWER,

500 Capital National Bank Building, Sacramento 14, California,

Attorneys for Appellees.

Subject Index

| | Page |
|--|------|
| Statement of the case | 1 |
| Argument | 4 |
| 1. That part of the default judgment is void which orders the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment | 4 |
| 2. The court below did not have jurisdiction over the board of supervisors or the county assessor when it issued its order citing them for contempt | 10 |
| 3. Disobedience of a void judgment, or one issued by the court without having jurisdiction of the parties to be bound, is not contempt | 12 |
| 4. Relief by mandamus should not be granted except as a matter of sound judicial discretion after a careful consideration of all of the material facts | 13 |
| 5. The case of Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860, is distinguishable from our case | 22 |
| 6. Reply to certain other arguments in appellant's brief | 25 |
| (a) Argument that it was not necessary for appellant to seek the remedy provided in sections 26550-26553, inclusive, of the Water Code of the State of California (Applt's. Br. 10-13) | 25 |
| (b) Charge that the irrigation district has made no attempt to try to work out a solution to its financial difficulties (Applt's. Br. 14) | 25 |
| (c) Argument that the board of supervisors and the county assessor were not necessary parties to the action (Applt's. Br. 16-27) | 25 |
| (d) Argument that the board of supervisors and the county assessor were afforded due process (Applt's. Br. 27-29) | 26 |
| (e) Statement that the board of supervisors and the county assessor were not entitled to their day in court (Applt's. Br. 29) | 26 |
| Conclusion | 27 |

Table of Authorities Cited

| Cases | Pages |
|---|------------|
| American Securities Company v. van Loben Sels, 13 Cal. App. (2d) 265, 56 Pac. (2d) 1247 | 6 |
| Balaam v. Perazzo, 211 Cal. 375, 295 Pac. 330..... | 7 |
| Beauchamp v. United States, 76 Fed. (2d) 663 | 12, 13 |
| Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860 | 22, 23, 26 |
| Buss v. Prudential Ins. Co. of America, 126 Fed. (2d) 960.. | 10, 11 |
| City of San Diego v. Andrews, 195 Cal. 111, 231 Pac. 736.. | 25 |
| Clough v. Baber, 38 Cal. App. (2d) 50, 100 Pac. (2d) 519 | 15 |
| Donegan v. City of Los Angeles, 109 Cal. App. 673, 293 Pac. 912 | 10 |
| Duncan Townsite Company v. Lane, 245 U.S. 308, 62 L. ed. 309, 38 S. Ct. 99 | 14 |
| El Camino Land Corporation v. Board of Supervisors of Tehama County, 43 Cal. App. (2d) 351, 110 Pac. (2d) 1076..... | 15, 16, 20 |
| Erie Railroad Company v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817 | 7, 8 |
| Ex parte Ayers, 123 U.S. 443, 31 L. ed. 216, 8 S. Ct. 164.. | 13 |
| Ex parte Fisk, 113 U.S. 713, 28 L. ed. 1117, 5 S. Ct. 724... | 13 |
| Guaranty Trust Company v. York, 326 U.S. 99, 89 L. ed. 2079, 65 S. Ct. 1464 | 8, 9 |
| Hammond v. Hull, 131 Fed. (2d) 23 (certiorari denied, 318 U.S. 777, 87 L. ed. 1145, 63 S. Ct. 830)..... | 13 |
| Hawkins v. Abbott, 40 Cal. 639 | 10 |
| King v. United Commercial Travelers,U.S....., 92 L. ed. 479,S. Ct..... | 8 |
| Lang v. Lang, 182 Cal. 765, 190 Pac. 181..... | 6, 7 |
| Mallow v. Hinde, 12 Wheaton 193, 6 L. ed. 599 | 11 |
| McMurtrey v. Clark, 157 Fed. (2d) 703 | 25 |

| | Pages |
|--|---------|
| Metropolitan Life Insurance Company v. Welch, 202 Cal. 312, 260 Pac. 545 | 5, 6, 7 |
| Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565..... | 7, 10 |
| Peters v. Peters, 16 Cal. App. (2d) 383, 60 Pac. (2d) 313.. | 6 |
| Selby v. Oakdale Irrigation District, 140 Cal. App. 171, 35 Pac. (2d) 125 | 20, 25 |
| The Lessee of Walden v. Craig's Heirs, et al., 14 Peters 147, 10 L. ed. 393 | 11 |
| Thompson v. Perris Irrigation District, 116 Fed. 769..... | 23, 24 |
| Toland v. Sprague, 12 Peters 300, 9 L. ed. 1093 | 11 |
| United States v. Dern, 289 U.S. 352, 77 L. ed. 1250, 53 S. Ct. 614 | 14 |

Codes

Code of Civil Procedure:

| | |
|---|-------|
| Section 580 | 5, 9 |
| Section 1917 | 10 |
| 28 U.S.C.A., following Section 723c | 9, 13 |

Water Code of the State of California:

| | |
|-------------------------------------|----|
| Section 25650, subsection (b) | 20 |
| Section 26500 | 21 |
| Sections 26500 to 26504 | 2 |
| Sections 26550 to 26553 | 4 |
| Section 26553 | 25 |

No. 11,798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PUEBLO TRADING Co. (a corporation),
Appellant,

vs.

EL CAMINO IRRIGATION DISTRICT (a
public corporation); B. A. OSBORN,
S. E. AYER, J. P. BURTON, WALTER
MAYES and WALTER BUNTING, Mem-
bers of the Board of Supervisors of
Tehama County, and W. E. ROCH-
FORD, Assessor of Tehama County,
California,
Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing a contempt proceeding against appellees B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and Walter Bunting, as members of the Board of Supervisors of Tehama County, California, and against appellee W. E. Rochford, as Assessor of Tehama County.

Appellant Pueblo Trading Company is the holder of \$53,000.00 par value of interest bearing bonds out of a total of \$423,000.00 par value of interest bearing bonds issued by appellee El Camino Irrigation District. Appellant commenced an action against the irrigation district in the Court below for a money judgment for the amount of principal and interest owing and unpaid on the bonds held by appellant (R. 2-5). The irrigation district failed to make an appearance in the action and appellant recovered a judgment *by default* against the district wherein it was ordered that, upon the failure or refusal of the irrigation district and its officers to make provision for payment of the default judgment, the board of supervisors and other officers of Tehama County should make provision for payment of the same by levying and collecting assessments against the lands in the district in the manner provided by Division 11 of the Water Code of the State of California.¹ (R. 7.) *This part of the default judgment went beyond the complaint and exceeded the prayer which was for a money judgment and for general relief.* (R. 5.)

Copies of the default judgment were served upon all of the appellees herein, except Walter Bunting who was not a member of the board of supervisors at the time service was made. (R. 9-11.) Thereafter, by a written notice and demand, appellant notified the board of supervisors that the irrigation district had

¹Sections 26500 to 26504, inclusive, of the Water Code provide for the levying of assessments by the county in cases where the irrigation district fails to make the required levy. They are set forth in the appendix to this brief.

failed to levy any assessment, or to take any other action, for the purpose of satisfying the default judgment; demanded that the board of supervisors forthwith levy such assessment; and advised the board of supervisors that if it failed to make such levy, application would be made to the Court for an order citing the board of supervisors for contempt of Court for failing to carry out the provisions of the default judgment. (R. 24.)

For reasons which will be discussed later, the board of supervisors did not make the levy demanded by appellant. Whereupon the Court below, upon application by affidavit (R. 14-16) filed on behalf of appellant, issued its order directing appellees B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and Walter Bunting, members of the board of supervisors, and appellee, W. E. Rochford, county assessor, to show cause before the Court why they and each of them should not be punished for contempt for disobedience of the default judgment and why such further order in the premises should not be made as would insure the levy and collection of assessments for the satisfaction of the default judgment. (R. 12.) *None of these appellees had been made a party to the action, or had made a voluntary appearance therein, or, prior to the issuance of this order, had been brought before the Court by any process whatsoever.*

The members of the board of supervisors and the county assessor demurred to appellant's affidavit for order to show cause, on the grounds: (1) that that part of the default judgment upon which the order

was based went beyond the complaint and was therefore ineffective; (2) that none of these appellees had been made a party to the action or had been brought before the Court by any process whatsoever; and (3) that it did not appear from the affidavit that appellant had pursued the remedies provided to it by Sections 26550 to 26553, inclusive, of the Water Code of the State of California.² (R. 18.) An affidavit in opposition to the order to show cause was filed on behalf of the members of the board of supervisors and the county assessor in which it was shown that the failure of these appellees to levy the assessment was not prompted by any lack of respect for the Court, but was due solely to the desire of these appellees to have their day in Court. (R. 19, 20.) The position taken by these appellees was supported by a written opinion of the Attorney General of the State of California. (R. 21-23.)

The matter came on for hearing and the Court below dismissed the contempt proceeding. (R. 27-29.)

ARGUMENT.

1. **THAT PART OF THE DEFAULT JUDGMENT IS VOID WHICH ORDERS THE BOARD OF SUPERVISORS AND OTHER OFFICERS OF TEHAMA COUNTY TO MAKE PROVISION FOR PAYMENT OF THE MONEY JUDGMENT.**

The judgment recovered by appellant, and upon which the contempt proceeding is based, was a judg-

²These sections of the Water Code are set forth in the appendix hereto.

ment *by default*. Appellee irrigation district, the defendant below and only other party to the action, did not make an appearance. The prayer of appellant's complaint was for a money judgment "and for such other relief as may be proper". (R. 5.) The relief granted by the Court below exceeded the relief specifically prayed for in the complaint, by ordering the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment against appellee irrigation district through the levy and collection of assessments against lands in the district. (R. 7.)

Because this was a judgment *by default*, the only relief which the Court below had power to grant was the relief specifically prayed for in the complaint, i. e., a money judgment for the principal and interest owing and unpaid on the bonds. Code of Civil Procedure of the State of California, Section 580.³ This rule is stated by the California Supreme Court, in the case of *Metropolitan Life Insurance Company v. Welch*, 202 Cal. 312, at 314, 315, 260 Pac. 545, as follows:

"In an action wherein the judgment is entered by reason of the failure of the defendant to appear and answer the complaint therein, the relief granted cannot exceed that which is demanded in the complaint (Code Civ. Proc., sec. 580 * * *)."

³This section provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

In an earlier case, *Lang v. Lang*, 182 Cal. 765, at 769, 190 Pac. 181, the same Court said:

“* * * it is a well-established rule that in a default case the relief granted cannot exceed the prayer.”

The prayer for general relief did not enlarge the power of the Court so as to enable it to grant the additional relief ordering the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment. As stated in the *Metropolitan Life Insurance Company* case, 202 Cal. 312, at 315, 260 Pac. 545:

“Where there is no answer the prayer for general relief cannot enlarge the power of the court to grant relief not specifically prayed for.”

And in the case of *Peters v. Peters*, 16 Cal. App. (2d) 383, 385, 60 Pac. (2d) 313, the Court said:

“It has been held also that the general language of a prayer such as ‘for any further relief’, etc., adds nothing to the prayer of the complaint when a default judgment is entered thereon”. (Citing the *Metropolitan Life Insurance Company* case and other California decisions.)

See also the case of *American Securities Company v. van Loben Sels*, 13 Cal. App. (2d) 265, at 269, 56 Pac. (2d) 1247, where the Court said:

“Defendants rely upon a legal principle which is beyond dispute. Where, as here, judgment is taken by default, no relief can be granted in excess of that prayed for. Even though the allegations of the complaint would support a judgment

for additional relief, *and general relief is asked for*, the judgment cannot exceed the specific prayer of the complaint.” (Italics ours.)

The default judgment, insofar as it orders the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment, is void. This is shown by the following statement in the *Lang* case, 182 Cal. 765, at 769, 190 Pac. 181, where the California Supreme Court, after stating the rule that in a default case the relief cannot exceed the prayer, said:

“And where relief is given beyond the scope of that asked for, it is a nullity, and may be attacked collaterally, or its effect avoided under the doctrine that it is not *res judicata*.”

This statement was later quoted with approval in the *Metropolitan Life Insurance Company* case, 202 Cal. 312, at 315, 260 Pac. 545.

Having been void when rendered, this part of the judgment will always remain void. *Pennoyer v. Neff*, 95 U. S. 714, 728, 24 L. ed. 565, 570. The Court could, of its own motion or upon having its attention called to the invalidity, make an order striking such part from the judgment. *Balaam v. Perazzo*, 211 Cal. 375, 380, 295 Pac. 330.

The Court is here dealing with a state-created right and the only basis for federal jurisdiction is the diversity of citizenship between the parties. Under the rule of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, the validity of

the judgment is to be determined by the law of California. The rule of the *Erie Railroad Company* case^{3a} was applied by the United States Supreme Court in the case of *Guaranty Trust Company v. York*, 326 U. S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, which involved the question whether in a diversity case a federal Court in equity could grant relief, when no recovery could be had in the state Courts because the action was barred by a state statute of limitations. The opinion of the Court was delivered by Mr. Justice Frankfurter, who said (326 U. S. at 109, 110, 89 L. ed. at 2086, 2087) :

“The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding ‘substance’ and ‘procedure’, we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof [citing authorities], as to conflict of laws [citing authorities], as to contributory negligence [citing authorities]. *Erie R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.

^{3a}See *King v. United Commercial Travelers*, U.S., 92 L. ed. 479, 482, S. Ct., for the latest pronouncement of this rule.

“Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.”

Turning now to California law, it has been shown that in a suit brought in a state Court, Section 580 of the Code of Civil Procedure would completely bar that part of the default judgment which orders the board of supervisors and other officers of Tehama County to levy the assessment. The decision in the *Guaranty Trust Company* case holds, we submit, that the federal Courts should follow the state law in this matter.

It appears that the same result should be reached through the application of Rule 54(c) of the Federal Rules of Civil Procedure⁴ which provides:

“A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.”

This indicates that in cases where a judgment is taken *by default*, the prevailing party is *not* entitled to relief which is not specifically prayed for in the complaint.

⁴28 U.S.C.A., following Section 723c.

2. THE COURT BELOW DID NOT HAVE JURISDICTION OVER THE BOARD OF SUPERVISORS OR THE COUNTY ASSESSOR WHEN IT ISSUED ITS ORDER CITING THEM FOR CONTEMPT.

It is fundamental that the board of supervisors and the county assessor were not bound by the default judgment, which was a judgment *in personam*, unless the Court below had jurisdiction over them. *Pennoyer v. Neff*, 95 U.S. 714, 724, 24 L. ed. 565, 569; *Buss v. Prudential Ins. Co. of America*, 126 Fed. (2d) 960, 966; Code of Civil Procedure of the State of California, Section 1917;⁵ *Donegan v. City of Los Angeles*, 109 Cal. App. 673, 681, 293 Pac. 912. Such jurisdiction could have been acquired only by the lawful service of process upon them or by their voluntary appearance. *Pennoyer v. Neff*, 95 U.S. 714, 724, 725, 24 L. ed. 565, 569, *Hawkins v. Abbott*, 40 Cal. 639, 640.

The members of the board of supervisors and the county assessor were not parties to the action and none of them made a voluntary appearance or was brought before the Court by any process whatsoever prior to the issuance of the order citing them for contempt. It is true that they were served with copies of the default judgment and that appellant served the board of supervisors with a written notice and demand. This, however, was not such service of process or notice as will satisfy the jurisdictional requirement; they were

⁵This section reads as follows: "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment."

entitled to have such notice as would have enabled them to appear in Court and be heard on matters relating to performance by them, prior to rendition of the judgment purporting to bind them. As stated by the United States Supreme Court in the case of *Toland v. Sprague*, 12 Peters 300, at 329, 9 L. ed. 1093, at 1105:

“Nothing can be more unjust than that a person should have his rights passed upon, and finally decided by a tribunal, without some process being served upon him by which he will have notice, which will enable him to appear and defend himself.”

Stated another way, the general rule is that “no court can adjudicate directly upon a person’s right, without the party being either actually or constructively before the court.” *Mallow v. Hinde*, 12 Wheaton 193, 198, 6 L. ed. 599, 600; *Buss v. Prudential Ins. Co. of America*, 126 Fed. (2d) 960, 966.

It follows that the Court below did not have jurisdiction over the board of supervisors or the county assessor, either when it pronounced the default judgment or when it issued the order citing them for contempt. Jurisdiction having been taken over these appellees when they had not been served with process, that part of the judgment which purports to bind them is void. This is made clear by the following statement by the United States Supreme Court in the case of *The Lessee of Walden v. Craig’s Heirs et al.*, 14 Peters 147, at 154, 10 L. ed. 393, 397:

“It is admitted that the service of process, or notice, is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken where there has been no service of process, or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void.”

3. **DISOBEDIENCE OF A VOID JUDGMENT, OR ONE ISSUED BY THE COURT WITHOUT HAVING JURISDICTION OF THE PARTIES TO BE BOUND, IS NOT CONTEMPT.**

It has previously been shown in the argument that the Court below did not have authority to grant the additional relief ordering the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment. Under controlling law this part of the judgment is void because it exceeds the relief specifically prayed for in the complaint and the judgment in this action was taken by default. It has also been shown that this part of the judgment is void for the further reason that the Court did not have jurisdiction over the board of supervisors or the county assessor when the judgment was rendered.

It is a well established rule that disobedience of a void judgment, or one issued by the Court without having jurisdiction over the parties to be bound, is not contempt. This Court had occasion to state this rule in its opinion in the case of *Beauchamp v. United States*, 76 Fed. (2d) 663, 668. It follows, as a corollary to this rule, that if the Court below had issued an order punishing the members of the board of super-

visors or the county assessor for contempt, that order would have been equally void. *Ex parte Fisk*, 113 U.S. 713, 718, 28 L. ed. 1117, 1119, 5 S. Ct. 724; *Ex parte Ayers*, 123 U.S. 443, 485, 31 L. ed. 216, 223, 8 S. Ct. 164; *Beauchamp v. United States*, 76 Fed. (2d) 663, 668. Clearly, the Court below did not commit error by dismissing the contempt proceeding.

4. RELIEF BY MANDAMUS SHOULD NOT BE GRANTED EXCEPT AS A MATTER OF SOUND JUDICIAL DISCRETION AFTER A CAREFUL CONSIDERATION OF ALL OF THE MATERIAL FACTS.

The default judgment, insofar as it orders the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment, grants relief in the nature of mandamus. Although writs of mandamus were abolished by Rule 81(b) of the Federal Rules of Civil Procedure, the remedy still is available and is governed by the same principles as formerly applied. Federal Rules of Civil Procedure, Rule 81(b),⁶ 28 U.S.C.A., following Section 723c; *Hammond v. Hull*, 131 Fed. (2d) 23, 25 (certiorari denied, 318 U.S. 777, 87 L. ed. 1145, 63 S. Ct. 830.)

It is well established that relief by mandamus is not granted as a matter of right, but only as a matter of sound judicial discretion. This presupposes a care-

⁶This rule is as follows: "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

ful consideration of all of the material facts by the Court. A clear expression of this rule is found in the case of *Duncan Townsite Company v. Lane*, 245 U.S. 308, at 311, 312, 62 L. ed. 309, at 311, 38 S. Ct. 99, where Mr. Justice Brandeis said:

“Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief, or will be within the strict letter of the law, but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles.”

For another and later statement of the rule see the case of *United States v. Dern*, 289 U.S. 352, at 359, 360, 77 L. ed. 1250, 53 S. Ct. 614, at 617, where Mr. Justice Stone said:

“Although the remedy by mandamus is at law, its allowance is controlled by equitable principles [citing cases]; and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right.

* * * * *

“The Court, in its discretion, may refuse mandamus to compel the doing of an idle act, [citing cases] or to give a remedy which would work a public injury or embarrassment [citing cases]

just as, in its sound discretion, a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.”

This is also the rule in California. *El Camino Land Corporation v. Board of Supervisors of Tehama County*, 43 Cal. App. (2d) 351, 354, 355, 110 Pac. (2d) 1076; *Clough v. Baber*, 38 Cal. App. (2d) 50, 53, 100 Pac. (2d) 519.

Applying this rule to the cause now before this Court, what were the material facts which the Court below should have considered before ordering the board of supervisors and other officers of Tehama County to levy an assessment? This very matter, involving the same bond issue of appellee irrigation district, was before the state Courts in 1941, in the case of *El Camino Land Corporation v. Board of Supervisors of Tehama County*, 43 Cal. App. (2d) 351, 110 Pac. (2d) 1076. In that case a bondholder sought a writ of mandamus to compel the Board of Supervisors of Tehama County (the present members of which are appellees herein) to levy an assessment upon all assessable lands within appellee irrigation district in an amount sufficient to retire the matured and outstanding bonds of the district. The Superior Court of Tehama County refused to issue the writ and the District Court of Appeal for the Third Appellate District affirmed the lower Court's decision. A petition for hearing was denied by the State Supreme Court.

In arriving at its decision the Superior Court found facts showing that it was the legal duty of the board of supervisors to levy the assessment, but it also found additional facts of an equitable nature which precluded the issuance of the writ. These latter findings are somewhat lengthy and we quote them here only because of their materiality to the cause now before this Court. The same irrigation district, the same bond issue and the same board of supervisors are involved. In a sense the decision in the *El Camino Land Corporation* case establishes the law of the case. The findings are as follows (43 Cal. App. (2d) at 352-354) :

“It is true that in taking into account said bond issue and the interest accumulations thereon and the obligations of the land in said district to the holders of said securities by reason of said indebtedness that the reasonable market value of the land which would be required to bear the burden of a one hundred twenty-eight and twenty-six/100 dollar (\$128.26) assessment per acre is as follows: Twenty-five per cent (25%) of the land within said El Camino Irrigation District has a value of twenty-five dollars (\$25.00) per acre; ten per cent (10%) of the land within said District has a value of sixty dollars (\$60.00) per acre; and approximately sixty-five per cent (65%) of the land within said district has a value of twenty dollars (\$20.00 per acre, there being a nominal area thereof immediately adjacent to the California State Highway, a portion of which has a probable value for industrial purposes.

“It is true that there are seven thousand five hundred forty-six (7,546) acres of land situated

within the exterior boundaries of the El Camino Irrigation District and that said District has acquired and is now the owner of all of said land except two thousand sixty-two and forty-eight/100 (2,062.48) acres thereof, and that the assessment sought to be levied by petitioner herein would require a levy on each acre of land left in private ownership and not held by the district in the sum of one hundred twenty-eight and twenty-six/100 dollars (\$128.26).

“It is true that the revenues derived from the operation of the lands within said El Camino Irrigation District are wholly insufficient to pay said sum of one hundred twenty-eight and twenty-six/100 dollars (\$128.26) per acre and that no part or portion of the lands within said District is able to bear the burden of such an assessment; and that a levy of one hundred twenty-eight and twenty-six/100 dollars (\$128.26) per acre as requested and demanded by petitioner herein would yield no funds for the payment of bond interest and bond principal but would throw the affairs of said district into a more complicated state of chaos and confusion and would be fatal to the landholders in said district and said landholders owning lands would lose title thereto for non-payment of assessments without benefit to the bondholders or holders of matured interest coupons.

“It is true that it is not within the ability of the lands within the said district, the title to which is now vested in private ownership, to pay an assessment in excess of those heretofore levied by the Board of Directors of the El Camino Irrigation District and that to levy a rate in excess

of those heretofore levied by the Board of Directors of the El Camino Irrigation District would be detrimental to the bondholders and landholders alike and would tend to and would destroy to a marked degree the possibility of securing revenue for the bondholders of the El Camino Irrigation District.

“It is true that to levy the assessment prayed for by petitioner would create a burden upon the lands situated within the El Camino Irrigation District so great and excessive that it would be neither practical nor possible for the landholders therein to pay the same and would yield no revenue to said district for the purpose of paying bond principal or bond interest and destroy its present meager ability to pay the cost of maintenance and operation of said district and thereby promote a collapse of the powers of said district to raise any sum by assessments upon the lands still remaining in private ownership causing said district to cease to function for lack of sufficient funds, destroying the security of creditors of said district and confiscating the equities of the landholders therein; and would result in gross inequities and serious damage; that the writ prayed for, if granted, would lead to chaos and confusion and would accomplish no useful purpose to the petitioner but only tend to destroy the district’s ability to yield revenue to petitioner and lead to inequities detrimental to all parties and result in a public mischief and destroy the spirit of equity and said district could not discharge its trusts.

“It is true that at the time of the filing of petitioner’s petition herein and for a long time prior thereto the El Camino Irrigation District, in fact,

was insolvent and/or unable to pay its obligations in full as they matured and that it has no funds or source from which to obtain funds with which to pay its obligations,—past, present or future,—in full, or in an amount comparable to the obligations due.

“It is true that an assessment as required by petitioner would exceed the actual reasonable value of the lands upon which it would be levied from two to five times; and that it would be impractical and unreasonable to expect any material return therefrom, and the court finds it would result in no advantage to petitioner but would result only in disadvantages and impairment of equities of petitioner and intervenors and the El Camino Irrigation District.”

Commenting now upon the above findings, it is obvious that the assessable lands in the district would have been unable to bear such a burden and that ultimately they would have been sold to the district for nonpayment of the assessment. In theory the power to tax is inexhaustible, but in practice this power may become, and often does become, ineffectual. As lands are sold to the district for nonpayment of the assessment, the burden is pyramided upon the remaining lands within the district until all of the assessable lands are sold to and owned by the district. The result is that no money is collected by the assessment, there are no longer any lands subject to assessment in the district, and these lands, now owned by the district, are removed from the county tax roll. This places an additional tax burden upon the other lands in the

county and the economic disaster continues apace, but on a county-wide scale. It was considerations such as these which prompted the state Courts to deny the remedy of mandamus in the *El Camino Land Corporation* case.

The failure, then, of the board of supervisors to levy the assessment was not due to any lack of regard for the Court. The decision in the *El Camino Land Corporation* case, which involved the district's ability to pay the necessary assessment, had held that such a levy would result in gross inequities and serious public injury and would accomplish no useful purpose. Although the default judgment in our case limited the levy to an amount sufficient to retire the bonds held by appellant, the board of supervisors would have been required by law to levy assessments in a total amount sufficient to retire all of the outstanding bonds of the district. Water Code of the State of California, Section 25650, subsection (b)⁷. As stated in the case of *Selby v. Oakdale Irrigation District*, 140 Cal. App. 171, at 177, 178, 35 Pac. (2d) 125:

“We have read all the acts of the legislature beginning with the act of 1897, down to and including the acts of the legislature of 1933, and fail to find a single clause, sentence or word giving to, or indicating that the board of directors of an irrigation district is invested with any power or authority to discriminate between bondholders in levying taxes for the payment either of

⁷This section is set out in the appendix hereto.

principal or interest; nor has our attention been called to any such provision in the various statutes. * * * The authorities cited and properly analyzed support the conclusion that when the statute under which the tax-levying board has acted, prescribes what shall be done, and grants the power to act in a particular manner, all actions different therefrom dependent simply upon the whim, wish or determination of the tax-levying body are *ultra vires*, and the act taken can only stand in so far as it complies with the express authority given and provided for by law.”

The lack of power or authority to discriminate between bondholders in levying assessments for the payment of principal or interest applies equally to the board of supervisors, inasmuch as assessments levied by this body are to be levied in the same manner and with the same effect as if levied by the board of the irrigation district. Water Code of the State of California, Section 26500.⁸ It is understandable that with these considerations in mind the members of the board of supervisors should desire an opportunity to present the material facts to the Court before being required to proceed with the levy.

Appellant states, on page 31 of its brief, that if the Court below was correct in dismissing the contempt proceeding it should have construed the order to show cause as a proceeding under Rule 81(b) of the Federal Rules of Civil Procedure⁹ and have proceeded *to require* the levy of an assessment. Appellant is here con-

⁸This section is set out in the appendix hereto.

⁹See footnote 6 supra.

tending that relief by mandamus should be granted to it as a matter of right. This, as we have seen, is not the law. Appellant is also contending that an assessment should be levied for the sole purpose of retiring the bonds held by it. As has been shown, such a levy is beyond the power of the board of supervisors.

5. **THE CASE OF BOARD OF SUPERVISORS OF RIVERSIDE COUNTY v. THOMPSON, 122 FED. 860, IS DISTINGUISHABLE FROM OUR CASE.**

In the case of *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860, a bondholder, in a previous action against the Perris Irrigation District, had recovered a money judgment on certain coupons attached to bonds issued by that irrigation district. That judgment was not taken by default, inasmuch as the case went to trial (122 Fed. at 860). It does not appear from the report of the *Thompson* case that the judgment ordered the Board of Supervisors of Riverside County to do anything in the premises.

Thereafter, the judgment creditor petitioned the Court for a writ of mandate requiring the board of supervisors to levy an assessment against the lands in the irrigation district in an amount sufficient to pay the money judgment. An alternative writ was issued and in response thereto the board of supervisors and the irrigation district moved to quash the writ and also interposed demurrers to the petition. The motions to quash and the demurrers were overruled by

the Court which thereupon ordered a peremptory writ of mandamus to be issued.¹⁰ Certain taxpayers of the district were then permitted to intervene, the order for the issuance of the peremptory writ was set aside, and answers were filed to the petition of the judgment creditor. The Court in this proceeding rendered judgment directing the issuance of the peremptory writ, which judgment was affirmed, upon appeal, in the *Thompson* case.

In distinguishing the *Thompson* case from our case, the Court below said:

“There [*Thompson* case] a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the board of supervisors to make a levy sufficient to satisfy the judgment. In the second action the board of supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense.” (R. 28.)

Appellant argues at length in its brief that the Court below misconstrued the decision in the *Thompson* case, in that the proceeding for a writ of mandate against the board of supervisors in that case was not a second action but merely a supplemental proceeding in aid of execution, and that the members of the board of supervisors were not made parties to any *suit* (Applt's. Br. 22-27). In our opinion this distinc-

¹⁰*Thompson v. Perris Irrigation District*, 116 Fed. 769.

tion in nomenclature, if correct, is unimportant. What is important is the fact that in the *Thompson* case the members of the board of supervisors were in Court and were afforded an opportunity to be heard, before the Court rendered its judgment directing the issuance of the peremptory writ which ordered the levy of an assessment. The alternate writ was the process by which the board of supervisors was brought before the Court. As stated in the related case of *Thompson v. Perris Irrigation District*, 116 Fed. 769, at 770, *the writ was process essential to jurisdiction.*

In the cause now before this Court, the Court below did not have jurisdiction over the Board of Supervisors of Tehama County or the Assessor of Tehama County when it entered the default judgment ordering them to levy the assessment. Nor did it have jurisdiction over them when it issued its order citing them for contempt. At no time prior to the day when they appeared in Court to answer the citation for contempt, were they brought before the Court or afforded an opportunity to present any of the material facts to the Court. *The lawful process, which is essential to jurisdiction, is lacking in our case.* There is the further difference that in our case the mandate, ordering the board of supervisors and other officers of Tehama County to levy the assessment, was contained in a default judgment and was void because it exceeded the relief specifically prayed for in the complaint.

We agree with the Court below that the *Thompson* case clearly is distinguishable from our case.

6. REPLY TO CERTAIN OTHER ARGUMENTS IN
APPELLANT'S BRIEF.

- (a) Argument that it was not necessary for appellant to seek the remedy provided in Sections 26550-26553, inclusive, of the Water Code of the State of California. (Applt's. Br. 10-13.)

Section 26553 of the Water Code¹¹ provides a remedy for the enforcement of the levying and collection of assessments. Pursuant to this section appellant should have made a complaint to the Attorney General of the State of California. Until appellant has exhausted its legal remedies, it is not entitled to relief by mandamus. *City of San Diego v. Andrews*, 195 Cal. 111, 120, 231 Pac. 736; *McMurtrey v. Clark*, 157 Fed. (2d) 703, 704. The case of *Selby v. Oakdale Irrigation District*, 140 Cal. App. 171, 35 Pac. (2d) 125, cited and quoted from by appellant, does not hold to the contrary.

- (b) Charge that the irrigation district has made no attempt to try to work out a solution to its financial difficulties. (Applt's. Br. 14.)

Appellant makes this charge and then admits that the matter is outside the purview of the present proceeding. The charge having been made, appellee irrigation district takes this opportunity to deny it as unfounded.

- (c) Argument that the board of supervisors and the county assessor were not necessary parties to the action. (Applt's. Br. 16-27.)

None of the members of the board of supervisors, or the county assessor, contends that he was a necessary

¹¹This section is set out in the appendix hereto.

party to the action for the money judgment. These appellees do contend, however, for reasons which appear earlier in the argument, that they are not bound by that part of the default judgment which orders them to levy an assessment and that they are entitled to notice and an opportunity to be heard in the matter before being required by the Court to proceed with a levy.

(d) Argument that the board of supervisors and the county assessor were afforded due process. (Applt's. Br. 27-29.)

It has been shown that the members of the board of supervisors and the county assessor were cited for contempt for disobedience of a void portion of a judgment, by a court which did not have jurisdiction over them. This, we submit, is not due process. The proceeding, by which the board of supervisors and the county assessor were brought before the Court, was highly irregular and it must follow that the dismissal of such a proceeding is not error.

(e) Statement that the board of supervisors and the county assessor were not entitled to their day in Court. (Applt's. Br. 29.)

Appellant makes this statement and cites the *Thompson* case, 122 Fed. 860, as authority. In the *Thompson* case the members of the board of supervisors had their day in court. There is nothing in that case which supports such a statement.

CONCLUSION.

It has been shown in the argument that that part of the default judgment is void which orders the board of supervisors and the county assessor to make provision for payment of the money judgment recovered by appellant against the irrigation district. It is void for two reasons: first, it exceeded the relief specifically prayed for in the complaint and the judgment was taken by default; and second, it was a judgment *in personam* and the Court did not have jurisdiction over the members of the board of supervisors or the county assessor when the judgment was rendered. Disobedience of that part of the judgment was not contempt, again for two reasons: first, that part of the judgment was void; and second, the Court did not have jurisdiction over the members of the board of supervisors or the county assessor, the parties to be bound. It is respectfully submitted that the Court below did not err in dismissing the contempt proceeding.

The members of the board of supervisors and the county assessor respectfully request that the Court do not make any order requiring them to levy an assessment pursuant to the applicable provisions of the Water Code of the State of California, unless the Court has first afforded them an opportunity to pre-

sent the material facts regarding the levy and has carefully considered those facts.

Dated, Sacramento, California,
April 8, 1948.

Respectfully submitted,

EDMUND M. MOOR,

District Attorney of the County of Tehama,
*Attorney for Board of Supervisors
and County Assessor of the County
of Tehama.*

L. C. SMITH,

STEPHEN W. DOWNEY,

RALPH R. MARTIG,

DOWNEY, BRAND, SEYMOUR & ROHWER,
Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

Water Code:

25650. Each district by its board each year within 15 days after the close of its session as a board of equalization shall levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following:

(a) Interest due or that will become due on all outstanding bonds of the district and interest which the board believes will become due on district bonds authorized but not sold, all respectively before the close of the next ensuing calendar year.

(b) Principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year.

To the extent that provision is otherwise made as permitted by law for the payment of bond principal and interest, levies for principal and interest pursuant to this section need not be made.

26500. If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.

26501. The applicable part of the equalized county assessment rolls of the affected counties shall be the

basis of assessment for the district when its assessments are levied pursuant to this article.

26502. If any land subject to assessment for the purposes of the district does not appear upon a county assessment roll used as the basis of assessment for the district, the land omitted shall be forthwith assessed by the county assessor of the county in which it is situated upon an order of the board of supervisors making the assessment, and a description of the property omitted shall be written in the roll prepared for the district assessments.

26503. The board of supervisors shall meet and equalize each assessment made pursuant to this article with the assessment of other land in the district. The same notice shall be given by the board of supervisors of a meeting for the purpose of equalizing the assessment to be made as herein directed as is provided to be given by a district secretary when a board is to meet to equalize assessments.

26504. All expenses incurred in levying the assessment shall be borne by the district concerned. Unless the expenses are paid within 60 days from the time when a demand for them is made, they shall be collected by an action commenced by the district attorney of the county whose board of supervisors prepared the assessment roll.

26550. The district attorney of each office county shall ascertain each year whether the duties relating to the levying and collection of assessments in districts have been performed or not, and if he learns

that the board or any official of any district has neglected or refused to perform any of these duties, he shall notify the board of supervisors or the county official required to perform the duty in the circumstances.

26551. Unless the board of supervisors or county official proceeds to perform the duties he has been notified to perform within 30 days after the receipt of notice, the district attorney shall take action in court to compel performance.

26552. The district attorney shall give notice to other officials and take any action necessary to secure the performance in their proper sequence of subsequent duties relating to the levying and collection of assessments.

26553. For the enforcement of the levying and collection of any assessment required to be levied and collected for the payment of any debt incurred, when complaint is made to the Attorney General that the district attorney of any county has not performed any duty devolving upon him by the provisions of this article or is not proceeding with due diligence or in the proper manner in the performance of the duty, the Attorney General shall make an investigation. If he finds the charge to be true, the Attorney General shall take any action necessary to enforce the performance of the duties relating to the levying and collection of assessments.

No. 11,798

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PUEBLO TRADING Co. (a corporation),
Appellant,

vs.

EL CAMINO IRRIGATION DISTRICT (a
public corporation); B. A. OSBORN,
S. E. AYER, J. P. BURTON, WALTER
MAYES and WALTER BUNTING, Mem-
bers of the Board of Supervisors of
Tehama County, and W. E. ROCH-
FORD, Assessor of Tehama County,
California,
Appellees.

APPELLANT'S PETITION FOR A REHEARING.

FILED

AUG 24 1948

PAUL P. O'BRIEN

CLERK

W. COBURN COOK,
Berg Building, Turlock, California,
*Attorney for Appellant
and Petitioner.*

Subject Index

| | Page |
|---------------------------------------|------|
| Argument | 2 |
| What the record and briefs show | 3 |
| Conclusion | 5 |

Table of Authorities Cited

| | Page |
|---|------|
| Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860 | 3 |

No. 11,798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PUEBLO TRADING Co. (a corporation),
Appellant,

vs.

EL CAMINO IRRIGATION DISTRICT (a
public corporation); B. A. OSBORN,
S. E. AYER, J. P. BURTON, WALTER
MAYES and WALTER BUNTING, Mem-
bers of the Board of Supervisors of
Tehama County, and W. E. ROCH-
FORD, Assessor of Tehama County,
California,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Circuit Court of Appeals for the
Ninth Circuit:*

Appellant respectfully petitions this Court for a re-hearing on this appeal on the following ground:

It is respectfully submitted that both this Court, in its majority opinion, and the District Court, in its order dismissing the contempt proceeding, failed to

consider or mention appellant's plea for execution of the money judgment by way of ancillary mandamus.

ARGUMENT.

The dissenting opinion of Judge Denman admirably states our position.

In the original order to show cause below, in the briefs of both parties on appeal, in the oral argument before this Court, and in the dissenting opinion filed herein, two separate issues were recognized: (1) Were the public officers subject to contempt for failure to make the levy as directed in the default judgment? And (2) Should the Court order them to show cause why a levy and collection of assessments to satisfy the judgment ought not be made?

This Court is unanimous in upholding the Court below for dismissing the contempt proceeding, and appellant does not direct this petition for rehearing to that first issue which must be considered settled. However, appellant does desire to have this Court consider and rule on the second issue before it.

Appellant's primary purpose is to enforce collection of the money judgment obtained on its bonds, not to punish the County of Tehama officials for contempt. However, both Courts in their opinions fully discussed the relatively minor contempt issue and were silent on the point of greater importance.

In considering the second portion of the order it is pointed out that the respondents are parties to the proceeding, and that they have had their day in Court

and been heard. In appearing they set forth claims of equitable defenses but at the hearing put in no testimony to support their position.

There is no substantial difference between the proceedings taken in the instant case and in the case of *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860, decided by this Court.

What the Court's opinion in the instant case amounts to is a declaration that unless all the officers of a public agency are made parties in the original complaint, they cannot afterwards be compelled to execute the judgment, yet it has never been the practice to make such officials parties.

WHAT THE RECORD AND BRIEFS SHOW.

That the Order to Show Cause which was served on appellees contained two parts is clearly shown by reading it. This Order provided (R. 12):

"It is Ordered that the said Board of Supervisors and officers of Tehama County * * * and Assessor of Tehama County, show cause before this court * * * why they and each of them should not be punished for contempt of court for disobedience of the judgment made and entered herein on the 13th day of February, 1945, and why such *further order* in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein." (Emphasis ours.)

In the Brief for Appellant (p. 30) the following point was raised: "The Court Erred in Not Regard-

ing Its Order to Show Cause as Process Under Rule 81 (b) of Federal Rules of Civil Procedure.” And on the following page:

“The Court should, if it was correct in dismissing the contempt proceedings, have construed the order to show cause as a proceeding under Rule 81 (b) of the Federal Rules of Civil Procedure and proceeded to require the levy of the assessment. This rule reads as follows:

‘The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.’

“The Court’s decision that it had no jurisdiction to proceed in the matter amounted to a declaration that the rule in question was unconstitutional as applied to the situation here.”

And it was further pointed out by appellant on page 32 of its brief before this Court:

“It would therefore appear that unless the relief sought in this case is granted the appellant will be denied the equal protection of the laws and the Courts for satisfaction and protection of its interests, that its property will be substantially taken from it without due process of law. Furthermore ample notice had been given to the appellees of the proceedings and we submit the Court should have entered an order requiring them to levy an assessment if it did not choose to hold them guilty of contempt.”

Judge Denman in his dissenting opinion (page 2) recognized the two issues:

“On the appeal here it was agreed that there were two matters before the lower court, one for the past contempt decided by the above order and another for future action, the mandamus proceeding for execution of the judgment in favor of the bondholder.”

He also set out portions of appellees' brief showing that they recognized the “difference between the contempt portion and the mandamus portion of the relief sought by the bondholder.”

Footnote 2 of the majority opinion of this Court reads:

“Appellant's petition stated but one cause, namely, for peremptory relief predicated on an asserted contempt. We have not considered and do not decide what other form of relief, if any, appellant may be entitled to.”

CONCLUSION.

It is respectfully submitted that the Court has failed to consider the important issue of this appeal and that a rehearing is proper under such circumstances.

Dated, Turlock, California,
August 24, 1948.

Respectfully submitted,
W. COBURN COOK,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated, Turlock, California,
August 24, 1948.

W. COBURN COOK,
*Attorney for Appellant
and Petitioner.*

